

VOLUME VII
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
PENNY T. COLLINS,

Plaintiff,

vs.

5:07-CV-493

THE STATE OF NEW YORK, NEW YORK
STATE DEPARTMENT OF CORRECTIONAL SERVICES,
GLENN S. GOORD, JOHN BURGE, HAROLD GRAHAM,
and TROY MITCHELL,

Defendants.
-----x

Transcript of a Jury Trial held on March 20,
2012, at the James Hanley Federal Building,
100 South Clinton Street, Syracuse, New York, the
HONORABLE GLENN T. SUDDABY, United States District
Judge, Presiding.

A P P E A R A N C E S

For Plaintiff: MAIREAD E. CONNOR, ESQ.
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For Defendant: SATTER, ANDREWS LAW FIRM
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BY: ROSS P. ANDREWS, ESQ.

For Defendants: STATE OF NEW YORK
(All Remaining) Office of Attorney General
The Capitol
Albany, New York 12224
BY: CATHY Y. SHEEHAN, AAG
ROGER KINSEY, AAG

1 (Open Court, Jury Out, 8:50 a.m.)

2 THE COURT: Okay. Good morning.

3 MS. SHEEHAN: Good morning.

4 MR. KINSEY: Good morning, your Honor.

5 THE COURT: Hope everybody had a good night.

6 The record should reflect we're in session without the jury,
7 we have plaintiff, plaintiff's counsel, defendants, and
8 defense counsel, and we have all the defendants, welcome
9 back.

10 Rule 50 motions. We have a motion first of
11 all with regard to the state and defendants Burge and Graham.
12 Ms. Connor, I'm extremely concerned about the legal
13 sufficiency of the cases that you've put in, particularly
14 against defendants Burge and Graham. I don't believe that
15 there's really any factual dispute with regard to the
16 testimony that's come in and what they -- how they responded
17 to various complaints that were sent to them.

18 That being said, the court is mindful that
19 we've had a jury here for over a week, eight days, and the
20 court is also mindful that the best way to ensure that this
21 case is over and ended for all parties is to let this jury
22 decide. So I'm going to reserve with regard to the Rule 50
23 motions with regard to defendants Burge and Graham, and I
24 indicate that to counsel and say that you're certainly free
25 to renew your motion should there be a verdict against either

1 one or both of those defendants.

2 Again, I have concern with regard to the
3 sufficiency of the proof against defendant Mitchell, although
4 you may have more of an argument with regard to defendant
5 Mitchell, depending on the view of the evidence, but it is,
6 again, razor thin with regard to the proof that you put in.
7 So I am going to deny that motion and let the jury decide
8 that as well.

9 I'm going to deny the motion with regard to
10 the state, New York State Division of -- Department of
11 Corrections, excuse me. Okay. So I think the court feels
12 the best course of action is to let the jury, they've heard
13 this proof, let the jury do their work, and get the decision.
14 That being said, we need to have a charge conference, and --

15 MS. CONNOR: Your Honor, I have a matter for
16 the court before the charge conference.

17 THE COURT: What's that?

18 MS. CONNOR: Your Honor, plaintiff moves for
19 motion for a new trial, after granting of the judgment as a
20 matter of law with respect to the retaliation claims under
21 Title VII and the New York Human Rights Law. The plaintiff
22 submits that the court erroneously dismissed the Title VII
23 and New York Human Rights Law retaliation claims against the
24 Department of Corrections, as there is sufficient evidence in
25 the record to support such claims and the employer liability

1 for the claims.

2 The plaintiffs submit that the court
3 discounted retaliatory harassment that the plaintiff faced
4 which is a form of retaliation, and the evidence submitted as
5 proof by the plaintiff contains several examples of
6 retaliatory harassment, including but not limited to the
7 rumors at Auburn from Sullivan that Ms. Collins was suing,
8 the court's -- the smoky bear comments, we believe a
9 reasonable jury could conclude that those were done in
10 retaliation for plaintiff's complaining to others in the
11 administration or the office of diversity management about
12 her hostile environment. The comments from officers for
13 plaintiff to get out of here, you brought this on yourself,
14 the defacing of the photo at Auburn with the words
15 administrative transfer, the defacing of the photo at
16 Sullivan, and that the plaintiff respectfully disagrees with
17 the court's ruling that the plaintiff could not testify about
18 the circulation of the to-from memo of November 10th, 2005
19 from plaintiff to defendant Mitchell on hearsay grounds when
20 plaintiff was faced with numerous rumors and comments about
21 this memo frequently from other corrections officers which
22 contributed to her hostile environment.

23 These -- all of these acts were reported to
24 the employer and the employer failed to take prompt effective
25 remedial action. We believe that the hostile environment

1 harassment was so intertwined with the retaliatory harassment
2 that the court should view them as one and the same, in
3 supporting either a claim for hostile environment or
4 retaliatory harassment.

5 Additionally, the plaintiff would note that
6 there were comments written on the plaintiff's performance
7 reviews about not getting along and the decreased rating on
8 the review with respect to some of the categories of her
9 ability to get along with other officers, and that these
10 would deter a reasonable employee from complaining about
11 harassment in a hostile environment to her employer.

12 In addition, the plaintiff moves for a motion
13 for a new trial after the granting of a judgment as a matter
14 of law with respect to the aiding and abetting claim under
15 New York Human Rights Law against defendant Mitchell
16 regarding both hostile environment, sexual harassment, and
17 retaliation. The plaintiff submits that there's ample
18 evidence in the record that defendant Mitchell aided and
19 abetted the employer's hostile environment of the plaintiff
20 through his direct participation in the harassment, and that
21 that contributed to plaintiff's hostile environment and
22 there's inferential evidence, evidence from which an
23 inference can be drawn in the record by a reasonable jury
24 that -- withdrawn. And that plaintiff sought to submit
25 evidence that defendant Mitchell participated in the

1 circulating of a memorandum that was written to him by the
2 plaintiff, and that caused her to be the subject of ridicule
3 and harassment. Thank you.

4 THE COURT: Either counsel want to respond to
5 that? It's going to be denied. And Counsel, I think, you
6 know, you have a way of construing facts that aren't --
7 haven't been put into evidence here, that I think that, you
8 know, they may have been in your complaint, but they
9 certainly didn't come out as proof in this case. Counsel,
10 you want to be heard?

11 MS. SHEEHAN: No, your Honor.

12 THE COURT: Mr. Andrews?

13 MR. ANDREWS: For the reasons previously
14 stated by the court, you know, we obviously don't agree.

15 THE COURT: That will be denied. Are we ready
16 for charge conference?

17 MR. KINSEY: Yes, your Honor.

18 MS. SHEEHAN: Yes, your Honor.

19 MR. ANDREWS: Yes, your Honor.

20 MS. CONNOR: Yes, your Honor.

21 THE COURT: We're going to do that in the
22 court's library, and we'll head back there now. If you want
23 to walk around, the guard will let you in.

24 (In Chambers, 8:59 a.m.)

25 THE COURT: Okay. Let's start with the

1 general instructions and we'll move through that pretty
2 quickly. I don't know if there's any requests or objections
3 to -- let's start off with introduction, role of attorneys,
4 and evidence. First three pages. Any issues for anybody?

5 MS. SHEEHAN: No, your Honor.

6 MR. ANDREWS: No.

7 THE COURT: Okay, we're off to a blistering
8 start. That's good. How about evaluation of evidence? We
9 have subcategories of credibility of witnesses, medical
10 witnesses, expert witnesses, impeachment by prior
11 inconsistent statement, and all available evidence need not
12 be produced. Anything with regard to that section?

13 MS. CONNOR: Yes, your Honor. On page 5, B,
14 medical witnesses, the name Dr. Alley is mistyped or stated,
15 it's Alley, not Ayers.

16 THE COURT: Thank you. Anything else? Okay.
17 Having heard no further requests or objections, let's go to
18 burden of proof. Just there's an overview, preponderance of
19 the evidence and multiple defendants.

20 MS. CONNOR: With respect to B, preponderance
21 of the evidence, in the first paragraph, the last sentence or
22 phrase, "You must decide against her on the issue you are
23 considering," we would request that the pronoun also be added
24 "him" because there are affirmative defenses for which the
25 defendants would have the burden to prove preponderance of

1 the evidence so we would ask for a gender neutral pronoun
2 there.

3 THE COURT: You must decide against the party
4 on the issue you're considering.

5 THE LAW CLERK: Judge, if we do that, then we
6 have to change, it says before that, bearing the burden of
7 proof, has failed to establish her claim by preponderance of
8 the evidence so you would have to say her claim or his
9 defense, I mean just -- it's more complicated.

10 THE LAW CLERK: A party's claim or defense.

11 THE COURT: Yes. Just keep it party. Okay.
12 Anything else, with regard to the burden of proof section?
13 Okay. Getting to the substantive law, let's start with the
14 hostile work environment under Title VII and New York Human
15 Rights Law. Any issues in that section?

16 MS. CONNOR: Yes, your Honor, with respect to
17 A.1., hostile work environment, on page 12, we object to the
18 first full paragraph on page 12, that begins with, "Conduct
19 which may create a hostile work environment," that paragraph.
20 We would request that it state in the second line, the claim
21 includes, but is not limited to, and also, your Honor, we
22 would request that the court use page 4 of the plaintiff's
23 jury instructions with respect to gender-based or harassment
24 because of sex. We believe that the issue is not just sexual
25 in the traditional sense of that word but that the law

1 requires that the jury be instructed on the basis of
2 harassment because of sex. And that we believe that the
3 instruction here is too narrow and limits the jury's
4 consideration to too narrow of a range of harassment.

5 And on the plaintiff's proposed charge to the
6 jury, page 4, there is at the top a paragraph describing that
7 sexual harassment can, but need not, take the form of sexual
8 advances, requests for sexual favors or other verbal or
9 physical conduct of a sexual nature, and it continues, I'll
10 skip some words, rather, harassment directed at an employee
11 because of the employee's gender is sexual harassment. And
12 we would request that the jury be instructed along those
13 lines.

14 THE COURT: Well, we'll take another look at
15 it and I'll let you know. Any requests or objections with
16 regard to that request by plaintiff's counsel?

17 MR. ANDREWS: I would observe, I don't have
18 the complaint here unfortunately, I should have brought it in
19 with me, but I think it's pled as sexual harassment, the
20 case. I don't believe there's any reference to gender-based
21 harassment anywhere in the complaint.

22 MS. CONNOR: Your Honor, we believe that under
23 the law, sexual harassment is harassment because of sex, and
24 therefore the jury should be instructed as a broader
25 definition of harassment.

1 THE COURT: Counsel, I think what he's saying
2 is the way you pled it. It would go back to the pleading.

3 MS. CONNOR: I understand, but I believe that
4 the pleading should be construed liberally, and also that
5 that definition under the law is broader than just sexual
6 words describing sexual acts, or sexual advances.

7 THE COURT: Okay. Well, as I indicated, we'll
8 take a second look, have the law clerks take a second look at
9 that and I'll take a second look at it, once they've done
10 their research and I'll let you know. Anything else on that
11 particular section?

12 MS. CONNOR: Yes, your Honor. In the next
13 page, 13 of what you provided to us, I think that the
14 instruction in the third line that talks about the incidents
15 of harassment must occur in concert is not sufficiently
16 clear, concert seems to imply that more than one person would
17 be acting in conjunction with another person.

18 THE COURT: You're talking about the sentence
19 that starts with, "In general"?

20 MS. CONNOR: Yes, your Honor.

21 THE COURT: "In order to be actionable, the
22 incidents of harassment must occur in concert or with
23 regularity that can reasonably be deemed pervasive."

24 MS. CONNOR: Right. That I think in concert
25 implies that more than one person has to act together to

1 harass someone and I think that that's not a correct
2 statement of the law.

3 THE LAW CLERK: In concert with each other?

4 MS. CONNOR: I just would disagree with that
5 as well.

6 THE COURT: So what's the nature of your
7 request?

8 MS. CONNOR: To eliminate the concept that
9 incidents of harassment must occur in concert, that I think
10 that that's just a confusing term and has the wrong
11 implication.

12 THE COURT: Okay. Anything else? I'll --
13 again, we'll take a look at it and we'll let you know.
14 That's language right out of the charge, right?

15 THE LAW CLERK: Yes.

16 MS. CONNOR: Okay, yes, your Honor. With
17 respect to the same section, the plaintiff objects to the
18 omission of an instruction to the jury about the particular
19 setting in a prison which is described on pages 5 to 6 of the
20 plaintiff's jury instructions that -- the proposed jury
21 instructions, rather, that under *Dawson v. The County of*
22 *Westchester* case, that the jury could properly take the
23 prison setting into account and the environment and setting
24 that would make incidents of harassment more heightened with
25 respect to the plaintiff, and there's proposed wording on

1 pages 5 to 6 of the plaintiff's jury instruction that we
2 would request that the court adopt in the jury instructions.

3 MR. ANDREWS: I'm --

4 THE COURT: Before I let you go, and where are
5 you requesting that that be put into the jury charge?

6 MS. CONNOR: We're requesting that that be put
7 into the jury charge in the court's instructing the jury
8 about how to consider the totality of the circumstances with
9 respect to the evidence.

10 THE COURT: What page, where are you
11 referring?

12 MS. CONNOR: Page 13.

13 THE COURT: Are you referring to the last
14 paragraph, "If you find the plaintiff has established by
15 preponderance of the evidence that she was subjected to a
16 hostile work environment," when we get --

17 MS. CONNOR: Before that paragraph.

18 THE COURT: Before that, where are you
19 suggesting?

20 MS. CONNOR: It could be done after the
21 numerical --

22 THE COURT: Listing.

23 MS. CONNOR: -- listing that the court has
24 there, yes.

25 THE COURT: And you're looking for additional

1 language which indicates that the prison setting itself --

2 MS. CONNOR: May be considered, yes.

3 THE COURT: Anybody want to be heard on that?

4 MR. ANDREWS: I would suggest, your Honor,
5 that that's something that counsel is free to argue and it's
6 elevating, you know, an argument to the jury to the status of
7 a jury instruction and on behalf of defendant Mitchell, I
8 don't think it's appropriate.

9 MS. SHEEHAN: Agreed, but if we're going to
10 add a jury charge regarding the jurors being able to take the
11 prison setting into consideration, that it's a very neutral
12 statement, not one that says it would heighten, you know, the
13 reaction to jokes, sexual comments on walls, but it's just
14 neutral.

15 THE COURT: I think we're getting into an area
16 that may be fraught with some difficulties both ways in
17 keeping a charge neutral and just purely on the law. So I'll
18 take another look, but I'm inclined to deny that one. I
19 don't think it's appropriate to start talking about
20 fact-specific situations.

21 MS. CONNOR: Your Honor, with respect to the
22 same section, we would request that there be some additional
23 instruction concerning how the jury would consider the
24 different factors, specifically in the *Harris* case of the
25 Supreme Court, the court stated while each of the factors is

1 relevant, no single factor is required, and that the fact
2 that the law requires harassment to be severe or pervasive
3 before it can be actionable does not mean that employers are
4 free from liability in all but the most egregious cases and
5 that was specified in the Second Circuit case of *Torres v.*
6 *Pisano*, 1997, your Honor.

7 THE COURT: And where are you proposing that
8 that language be added?

9 MS. CONNOR: We're proposing that that
10 language be inserted after the listing of the factors in
11 considering the totality of the circumstances.

12 THE COURT: Same section?

13 MS. CONNOR: Yes, your Honor.

14 MR. ANDREWS: I would suggest that as written,
15 the instruction in a much more simple and less confusing way
16 covers that already by saying, you may consider the following
17 factors, doesn't say you must consider the following factors,
18 it explicitly says you may consider the following factors.

19 MR. KINSEY: The language may and the list is
20 suggestions that they may look at that, it's not preclusive,
21 it certainly is inclusive of anything else they may choose to
22 consider as a jury. I think the longer the laundry list, the
23 more likely that we're going to leave something out or steer
24 them in a certain direction, view of the facts.

25 MR. ANDREWS: Can I add something, your Honor,

1 with regard to saying that it's not only the most egregious
2 cases, you know, that can be found to be sexual harassment,
3 we don't have evidence about other cases, we haven't been
4 comparing this to other cases, these aren't attorneys doing
5 research, you know, these are jurors looking at this case.

6 THE COURT: Okay.

7 MS. CONNOR: Your Honor, I would point out
8 that I believe it would be very proper for the court to
9 instruct the jury while each of these factors may be
10 relevant, no single factor is required, after listing the
11 factors. I think that that does not confuse the jury, and is
12 a correct statement of the law and a neutral statement.

13 THE COURT: Anything else? With regard to
14 this section?

15 MS. CONNOR: I have nothing more, your Honor.

16 THE COURT: Let's go to B, sexual harassment.

17 MS. CONNOR: I'm sorry, I misunderstood the
18 court's question. I had something on page 14 of the proposed
19 instructions with respect to the Title VII employee liability
20 standard, I didn't realize you were skipping when you said B,
21 I'm not sure.

22 THE COURT: Okay, go ahead.

23 MS. CONNOR: Okay. On page 14, with respect
24 to the definition of supervisor, under Title VII employer
25 liability standard, your Honor, we request that the plaintiff

1 requests that in the second line where you give examples of
2 such authority include.

3 THE COURT: Where are you now, page 14?

4 MS. CONNOR: Page 14 of the proposed jury
5 instructions.

6 THE COURT: Examples of such, yes, go ahead.

7 MS. CONNOR: We would -- the plaintiff
8 requests that the court add language about, after the word
9 power, directly or indirectly, and then also the plaintiff
10 requests that the court add to the list, direct work, of the
11 different factors of authority that may be considered, and we
12 also request that the following, that you also may find an
13 employee to be a supervisor if the authority given by the
14 employer to the employee enabled or materially increased the
15 ability of the employee to create or maintain a hostile work
16 environment, and that that language is discussed in the
17 *Ellerth* case, and *Anderson v. County of Nassau* and is
18 described and discussed in the plaintiff's trial brief, your
19 Honor. Also, there are -- there is language to that effect
20 in the plaintiff's proposed jury instructions on page 7.

21 THE COURT: Anybody want to be heard?

22 MS. SHEEHAN: Your Honor, power to indirectly
23 or directly fire, I don't understand that, and I found
24 confusing, supervisors can direct her work?

25 MS. CONNOR: That's correct.

1 MS. SHEEHAN: Or the authority of an employee
2 can maintain a hostile work environment, I think they're all
3 very vague, I don't think --

4 MR. ANDREWS: I think --

5 MS. SHEEHAN: -- for jury instruction.

6 MR. ANDREWS: I think the longer requested
7 addition is confusing, I mean it's hard for me to follow, you
8 know, the direct or indirect, I don't think there's been any
9 testimony about direct or indirect authority to do any of
10 these things, so I'm not sure what that adds for the purposes
11 of this proceeding.

12 MS. CONNOR: Your Honor, there's been
13 testimony about superior officers having rank over
14 corrections officers and having the ability to be their
15 supervisor, it's in the employee manual, and having the
16 authority of a superior rank over correction officer, and I
17 believe that the jury instructions with respect to your
18 definition of supervisor does not take that into account.

19 THE COURT: And how do you think that saying
20 direct or indirect takes that into account?

21 MS. CONNOR: Well, because it would mean that
22 when you say indirectly, it would mean that superior officer
23 could recommend, somebody could interpret that as being meant
24 that you're fired and you walk out the door.

25 THE COURT: We'll discuss it. My inclination

1 is that your requests are confusing and complicate this
2 charge, to the point where it's going to be difficult for the
3 jurors to try and interpret what we're -- what I'm
4 instructing them. So we'll take a look and we'll discuss it,
5 but I'm inclined to leave that section as is. I will let you
6 know. Anything else before we move?

7 MS. CONNOR: Which section are you referring
8 to now, your Honor?

9 THE COURT: Well, let's go one by one.

10 MS. CONNOR: Okay.

11 THE COURT: Anything further on employer
12 liability?

13 MS. CONNOR: Yes, your Honor. With respect to
14 acts of a supervisor on page 15.

15 THE COURT: Yes, go ahead.

16 MS. CONNOR: At the fifth paragraph,
17 concerning the instruction about the employer generally
18 meeting its burden, if it shows it's maintained a policy, we
19 request that instruction be added that the mere existence of
20 a policy is not determinative that an employer has not met
21 the reasonable care standard. You must determine whether the
22 policy was being implemented and if so, whether it was
23 reasonable -- whether it was a reasonable and effective means
24 of meeting the employer's duty to prevent and correct sexual
25 harassment, and that language is proposed in the plaintiff's

1 jury instruction on page 8.

2 MS. SHEEHAN: Your Honor, I think it's
3 covered, took appropriate steps to address the complaint.

4 MS. CONNOR: Your Honor, we --

5 MS. SHEEHAN: You've covered it.

6 MS. CONNOR: We request that there be an
7 instruction that the mere existence of a policy is not
8 determinative that the employer has met its --

9 THE COURT: The language doesn't say that, it
10 says maintained a policy in sexual harassment and took
11 appropriate steps to address the complaint. That doesn't say
12 just the mere existence, there is, they must also take
13 appropriate steps within that policy, that covers what you're
14 asking.

15 MS. CONNOR: Well, the plaintiff believes that
16 when you say an employer generally meets its burden, that
17 that is confusing to the jury and sounds as though that's
18 what is -- what is needed, and that it doesn't specifically
19 instruct the jury that it is not necessary that the mere
20 existence, rather, of a policy doesn't determine that the
21 employer has met the burden.

22 THE COURT: That's not what it says, it says
23 and, and took appropriate steps. Okay. What else?

24 MS. CONNOR: On page 16, your Honor, at the
25 top, the second line in that sentence begins, "A credible

1 fear must be based on more than the plaintiff's subjective
2 belief." I think that the word credible is not proper for
3 the court to instruct the jury in this respect, that it
4 suggests that that -- a subjective belief is not credible,
5 and that we object to that word. And then also the next
6 line, evidence must --

7 THE COURT: How does it say that a subjective
8 belief is not credible? It says, a credible fear must be
9 based on more than the plaintiff's subjective belief, meaning
10 there must be some basis for it.

11 MS. CONNOR: In order to have a credible fear,
12 there has to be more than a subjective belief and the word
13 credible I think would make it seem that the plaintiff in
14 her -- the inferences couldn't be drawn from her testimony
15 that -- and that she's not credible, and I think that that
16 word is a loaded word, and could mislead the jury, instruct
17 the jury as to the plaintiff's credibility.

18 THE COURT: I'm not following your argument at
19 all there. You have a proposed word that you want to replace
20 credible with?

21 MS. CONNOR: I would eliminate the word.

22 THE COURT: That's going to be denied.

23 MS. CONNOR: Now, your Honor, with respect to
24 the next sentence, "Evidence must be produced to the effect
25 that the employer has ignored or resisted similar complaints

1 or taken adverse actions against employees in response to
2 such complaints," we object to that sentence. We don't think
3 that that's a correct statement of the law. We would propose
4 that, you may consider whether the plaintiff had reasonable
5 cause to believe that she would not be retaliated against if
6 she invoked the procedures and whether the plaintiff had
7 reason to believe that invoking the policy would be effective
8 in changing the alleged harasser's conduct.

9 THE COURT: Anybody want to be heard?

10 MS. SHEEHAN: I think it's a misstatement of
11 the law, your Honor.

12 MR. ANDREWS: I think it's hard to follow, I
13 had a hard time following it, frankly.

14 MS. SHEEHAN: It's taking the law and
15 tailoring it to her client's specific situation. It's not a
16 recitation of the standards.

17 MS. CONNOR: Your Honor, we would request that
18 the sentence, evidence must be produced to the effect that
19 the employer has ignored or resisted," that sentence be
20 stricken. That that is not a correct statement of the law.
21 That the plaintiff does not have to produce evidence that the
22 employers ignored or resisted similar complaints or taken
23 adverse actions against other employees in response to these
24 complaints. That's incorrect.

25 THE COURT: Well, I can tell you we didn't

1 make it up. We'll take a look at it and I'll let you know.

2 MS. SHEEHAN: Your Honor, this is under acts
3 of supervisor.

4 THE COURT: Yeah, I know. Where we going
5 next?

6 MS. CONNOR: For that section, your Honor,
7 that's what I have.

8 THE COURT: Okay. How about acts of a
9 coworker?

10 MS. CONNOR: All set.

11 THE COURT: You're all set. Employer
12 liability under New York Human Rights Law.

13 MS. CONNOR: All set.

14 THE COURT: No complaints, nothing there?

15 MS. CONNOR: No, your Honor.

16 THE COURT: All right. Sexual harassment
17 under 42 U.S.C. 1983. Anybody have any issues?

18 MS. SHEEHAN: No, your Honor.

19 MR. ANDREWS: On page 20, if we're getting
20 there.

21 THE COURT: Page 20, go ahead.

22 MR. ANDREWS: At the very bottom, number 4,
23 the harassment was so severe, I would ask that "and
24 pervasive" be added just because those are grouped together
25 throughout the instructions and I think that someone with a

1 sharp ear might actually think there's a distinction.

2 THE LAW CLERK: Or pervasive, I think it's an
3 "or", not an "and".

4 MS. CONNOR: I think it's "or pervasive" as
5 well, I would oppose "and" and say "or".

6 MR. ANDREWS: Case law says "and pervasive" up
7 and down and that there's a sliding scale and I think you
8 cover that by talking about all the factors to be considered,
9 but I think repeatedly in the case law it's severe and
10 pervasive.

11 MS. CONNOR: I would disagree with that, your
12 Honor, in that there -- either element can be shown and that
13 it's not required both be shown.

14 THE COURT: We'll take a look at it, I don't
15 disagree that it should say, have pervasive, it's a question
16 of whether it's and, or.

17 MR. ANDREWS: That's really the important part
18 is the pervasive thing.

19 THE COURT: Pervasive will be included, the
20 harassment was so severe, I note that on page 21 right at the
21 bottom, the last sentence, determine whether the conduct was
22 severe and pervasive, the same standards apply as in a Title
23 VII claim. So we'll just, we'll double check that language,
24 pervasive will be added in one context or the other, either
25 and, or. Section 4, page 20, and then we'll double check so

1 that the last sentence of that section on page 21, it will
2 read either and, or, depending on the determination of what's
3 most appropriate according to the law. Okay. So those two
4 will be looked at, but we will add pervasive in one context
5 or the other, in that section. Okay.

6 Proximate cause, anybody?

7 MR. ANDREWS: I did have one more thing in
8 that section again, very small and in that last sentence that
9 you just noted said severe and pervasive.

10 THE COURT: Yeah.

11 MR. ANDREWS: It says, "To determine whether
12 the conduct was severe and pervasive, the same standards
13 apply as in a Title VII claim." I would ask that it say, "in
14 a Title VII hostile work environment claim," just because
15 there is also a discrimination claim and I think it just
16 makes it a little clearer what we're talking about.

17 THE COURT: Anybody have any objection to
18 that?

19 MS. SHEEHAN: No, your Honor.

20 THE COURT: So you're proposing a hostile
21 work, what's the --

22 MR. ANDREWS: Title VII hostile work
23 environment claim, so just adding the words hostile work
24 environment.

25 THE COURT: Work environment.

1 MR. ANDREWS: And then --

2 THE COURT: No objection to that by anybody?

3 MS. CONNOR: No, your Honor.

4 MS. SHEEHAN: No, your Honor.

5 THE COURT: Okay. We'll add that language.

6 MR. ANDREWS: Again, with regard to really
7 this section, I know it comes up much earlier in the
8 instructions, but I think it's worth clarifying at this point
9 that to the extent there are allegations against the
10 individual defendants which is what this is about, that it
11 restate that the factors would have to be proved as to each
12 individual to find liability.

13 THE COURT: You mean as to separate
14 defendants?

15 MR. ANDREWS: To separate defendants because,
16 you know, we've talked, since we've talked about proving
17 against different defendants, we've gone through the Title
18 VII which can be an aggregate of acts, and I wouldn't want
19 them to think that Burge, Graham --

20 THE COURT: Lump everything.

21 MR. ANDREWS: -- and Mitchell together, you
22 know, that you can consider those as to the individual
23 liability.

24 THE COURT: And you're proposing that where,
25 at the end?

1 MR. ANDREWS: I would put a comma at the end
2 and say, so it says, "To determine whether the conduct was
3 severe and pervasive, the same standards apply as in a Title
4 VII hostile work environment claim, and must be proved as to
5 each individual defendant."

6 THE COURT: I think that's a reasonable
7 request.

8 MR. ANDREWS: And it's my last one.

9 THE COURT: Anybody have any objection to
10 that?

11 MS. SHEEHAN: No, your Honor.

12 MS. CONNOR: No, your Honor.

13 THE COURT: Okay. That language will be
14 added.

15 MR. ANDREWS: Thank you, your Honor.

16 THE COURT: Okay. Proximate cause.

17 MS. CONNOR: Your Honor, with respect to the
18 third paragraph that starts on page 21.

19 THE COURT: "Stated another way"?

20 MS. CONNOR: Yes. The second sentence there
21 says, "Since plaintiff's mental condition was preexistent,"
22 your Honor, we object to that in that I think it's improper
23 for the court to comment about whether plaintiff had a mental
24 condition that was preexisting. I think it's -- the court is
25 commenting on the evidence and arriving at some conclusion

1 and I think that that's not proper and we ask that that be
2 stricken.

3 THE COURT: Anybody want to be heard?

4 MR. KINSEY: The testimony that came in
5 through Dr. First especially, he had reviewed her records and
6 talked to her about her condition from virtually her
7 childhood, and found that that condition and stressors
8 preexisted her joining DOCS and we have a stipulation that
9 this event in January of 2003 was not attributable to DOCS
10 and the court also gave a curative instruction with regard to
11 Eastern and that they were to ignore that condition as well.

12 So I think there's enough testimony that has
13 come in that the court can certainly say as Dr. First did,
14 and it was not challenged, that it was a preexisting
15 condition. Certainly the jury should be allowed to consider
16 what portion of her overall mental condition is the liability
17 of the defendants.

18 THE COURT: The danger is that it needs to be
19 clear to this jury that the plaintiff had this preexisting
20 condition.

21 MS. CONNOR: And what condition is that, your
22 Honor?

23 THE COURT: Well, that she had a mental,
24 emotional difficulties as a result of prior acts that
25 occurred to her which you stipulated to.

1 MS. CONNOR: I stipulated to the acts, but
2 nothing to do with any mental condition as a result of the
3 acts, and that I believe that Dr. Alley, contrary to
4 Dr. First, testified that that -- that she did not have any
5 problems until she presented, mental condition, psychiatric
6 problems, until --

7 THE COURT: That's not what he said. He said
8 she was able to function at work. He didn't deny that she
9 had prior issues, and that there were preexisting stressors
10 that she was having to deal with, including childhood sexual
11 abuse and then the sexual attack that occurred in January,
12 was it 2002 or '3?

13 MS. CONNOR: '3.

14 THE COURT: January 1st, 2003. He didn't deny
15 that any of those things, what he did testify was that she
16 was able to cope, and she was able to deal with it at work.
17 But it, you know, the jury, considering those, that
18 situation, you know, I think correctly need to be directed
19 how to look at this prior -- these prior issues.

20 MS. CONNOR: So your Honor, given what you
21 said, I disagree that Dr. Alley testified that she had a
22 mental condition prior to her -- at the end of December 2005,
23 just because she was able to cope is not testimony that she
24 had a mental condition. And that I think that the term
25 mental condition sounds like she was mentally ill. It

1 suggests that, I think it's an improper characterizing of the
2 evidence, and that this is -- this is a factual dispute that
3 the jury should decide rather than the court tell the jury
4 what to decide.

5 THE COURT: We can certainly phrase it so that
6 it's within the jury's province and not saying it as a
7 conclusion. What Mike has just suggested I think is probably
8 an appropriate amendment to language. "To the extent that
9 you find that there was a prior condition," and then that
10 gives them the appropriate guidance from there. It's theirs
11 to decide, and that way I don't say it as a, you know,
12 foregone conclusion.

13 MS. SHEEHAN: If you're going rephrase it that
14 way, your Honor, can we then include mental condition?

15 THE COURT: Yeah, to the extent that you find
16 that plaintiff --

17 MS. SHEEHAN: Has a.

18 THE COURT: -- has a prior existing mental
19 condition.

20 MS. SHEEHAN: Thank you.

21 MS. CONNOR: Your Honor, object to the term
22 mental condition as well, I think that that suggests, it's
23 like a medical conclusion.

24 THE COURT: All right. What words would you
25 suggest?

1 MS. CONNOR: That would be improper. I would
2 suggest that the whole phrase there be struck.

3 THE COURT: I'm not going to strike the whole
4 phrase. I'm very amenable to rephrasing it, but I don't
5 think it's appropriate to just strike that whole section.

6 MS. CONNOR: Well, I can't suggest alternative
7 language, your Honor, because I believe it should be struck,
8 I don't think that that should be suggested by the court,
9 that she had a preexisting mental condition.

10 THE COURT: To the extent that you find there
11 is evidence of a preexisting mental health condition,
12 preexistent mental health issues.

13 MS. CONNOR: I'm opposed to that language as
14 well, your Honor, I think it suggests that she had it.

15 MS. SHEEHAN: Mental health condition.

16 THE COURT: No, it's to the extent that they
17 find it, doesn't suggest that she had it, if you find. Okay.
18 We'll adapt that language and we'll put it in there.

19 MS. CONNOR: Also, your Honor, at the top of
20 page 22, the court is saying in that sentence, the remainder
21 of that sentence that where it says, "the alleged conduct by
22 defendant caused her preexisting condition to get worse,"
23 that suggests that there's some sort of continuum. I think
24 that the medical testimony is in dispute about that, and we
25 would ask that that then be stricken, and that there be

1 language that's much more neutrally stated where something
2 like, the alleged conduct by defendants caused her mental
3 injury.

4 MR. KINSEY: Clearly if she has some injury,
5 be it physical or mental, then the liability only inures to
6 those actions that make it worse, you have to talk about what
7 was preexisting in order to get to causation and liability.
8 I don't know how else we would state it.

9 MR. ANDREWS: I think as it's written it
10 reflects that there's a conflict in the evidence already,
11 saying that they have to find something by a preponderance of
12 the evidence.

13 MR. KINSEY: Exactly.

14 MS. CONNOR: Well, your Honor, the language
15 says defendant -- let me start. Says she must prove by a
16 preponderance of the evidence that the alleged conduct by
17 defendants caused her preexistent condition to get worse, I
18 think that's the court saying in fact that she had a
19 preexisting condition rather than leave that to the province
20 of the jury.

21 THE COURT: No, we're saying, if you find that
22 she had a preexistent condition, then the evidence, you know,
23 alleged -- must prove by preponderance of the evidence that
24 the alleged conduct of the defendants made it worse, should
25 you find she had one. And we'll clean up that language but

1 that's basically what it's going to say. We're going to
2 leave it in the province of the jury, we're not going to say
3 conclusively, we're going to say, if you find that she had a
4 preexisting condition, then there must be proof that the
5 conduct of the defendants made it worse. It has to say that.
6 There is no other way to address this.

7 What else? Nothing more there?

8 MS. CONNOR: No, your Honor.

9 THE COURT: Okay. How about affirmative
10 defense, qualified immunity, anything in that section?

11 MS. CONNOR: Your Honor, the plaintiff is
12 opposed to that entire section on the basis that it was not
13 pled in the answer.

14 THE COURT: I've already resolved that issue,
15 pretrial motions. Anything else with regard to the language
16 there?

17 MS. CONNOR: No, your Honor.

18 THE COURT: Okay. Damages. Anything in that
19 first section of damages? Compensatory damages?

20 MS. CONNOR: Yes, your Honor. At the end of
21 the compensatory damages section which is A, we would request
22 at the top of page 26 before paragraph B begins, that the
23 court use language from the plaintiff's jury instruction on
24 page 16, and that says that, it begins on the bottom of page
25 15, you may award plaintiff reasonable compensation for the

1 following, there's certain items listed, being pain,
2 suffering, mental anguish and physical or emotional distress;
3 2, embarrassment and humiliation; 3, damage to reputation and
4 career; 4, loss of enjoyment of life, it is the plaintiff's
5 loss of ability to enjoy certain aspects of her life as
6 result of defendant's wrongdoing; and 5, other noneconomic
7 losses. We ask that that be -- that your instruction on
8 compensatory damages be expanded to give those examples.

9 MR. ANDREWS: We've got 32 pages of jury
10 instructions, and it's a lot to digest already, and to, you
11 know, state things that really should be argued to the jury
12 by counsel is unnecessary.

13 THE COURT: Okay. I'll take a look at it. I
14 am mindful that, you know, I think the instruction is
15 accurate on the law as is, particularly in this area. While
16 those are certainly items that you can argue, I don't know
17 that it's necessary that they be included in the charge. I
18 will look at it again, and we'll make a decision on that
19 before we go forward. Anything else? Damages, lost wages,
20 back pay, front pay, anything in those sections?

21 MS. CONNOR: No, your Honor.

22 THE COURT: Mitigation of damages. Any issues
23 there?

24 MS. SHEEHAN: No, your Honor.

25 MS. CONNOR: No, your Honor.

1 THE COURT: Nominal damages?

2 MS. CONNOR: No, your Honor.

3 THE COURT: And punitive damages.

4 MS. SHEEHAN: Your Honor, I think you reserved
5 on punitive damages, it was not pled in the complaint.

6 THE COURT: It was not pled in the complaint,
7 and based on the testimony that's come in, it's the court's
8 view that the only possibility of anyone being considered for
9 punitive damages if the jury were to accept and given the
10 most liberal view of testimony with regard to defendant
11 Mitchell, and Mr. Andrews, I'll hear you.

12 MR. ANDREWS: Well, your Honor, I think that
13 the evidence, I think as you stated in there, is thin with
14 regard to establishing sexual harassment, and obviously
15 punitive damages is a whole 'nother step up in standard, and
16 I don't think it's close. I don't think there's anything
17 pled in the complaint that satisfies the standard, I don't
18 think there's any proof that came in. You know, again, what
19 you had was in terms of sexual related conduct were two
20 statements that she said she didn't respond to, followed by
21 some statements five -- or I'm sorry, 13 to 14 months later,
22 that were really about himself and his family. When she
23 protested, never again. Stops. How that could be disregard,
24 you know, blatant disregard or what the standard is of her
25 rights, I just -- it completely escapes me, your Honor. And

1 again, to expose him to a judgment of punitive damages, when
2 there's a case with so many things going on and she's had so
3 many terrible things happen in her life, I don't think is
4 fair to defendant Mitchell.

5 THE COURT: Okay. Counsel, you want to be
6 heard?

7 MS. CONNOR: Yes, your Honor. I believe that
8 there is proof that defendant Mitchell acted with the
9 requisite state of mind of malice with respect to the
10 plaintiff and that if the jury could decide that defendant
11 Mitchell committed the acts alleged, that those acts
12 themselves speak to malice and that it also speaks to his
13 willful and reckless indifference to plaintiff's protected
14 rights, and that there -- if the jury finds that he did those
15 acts and that there's liability for those acts, that the acts
16 in and of themselves speak to the issue of the standard for
17 punitive damages and we request that it be left in the
18 instruction.

19 THE COURT: Mr. Andrews, I don't have great
20 argument with your assessment of the proof in this case, but
21 the -- it's an assessment, and I think that to be safe, the
22 appropriate way to deal with this is to let the jury decide
23 it, and to hear it. I am cognizant of your arguments and
24 while I may tend to sympathize with your position, I think
25 the more appropriate way to deal with this is, you know, if

1 you take the most liberal viewing of this evidence, a jury
2 may say that he had malice based on some of the alleged acts
3 towards her. So I'm going to give this charge to the jury
4 and let them decide.

5 MS. SHEEHAN: Your Honor, may you add, ask you
6 to add "as to defendant Mitchell" at the end of the first
7 paragraph. I know the verdict sheet will be clear.

8 THE LAW CLERK: We've already done that,
9 Judge, we changed it just to make it clear that it's as to
10 Mitchell.

11 MR. ANDREWS: Your Honor, if I may just be
12 briefly heard, I think that makes it even more unfair for
13 him, you know, to single him out. I understand you're saying
14 he's the only one it could be to, but on these facts --

15 THE COURT: We point out that plaintiff also
16 seeks damages against defendant Mitchell, if you do not
17 award, you know, I don't think there's any other way to deal
18 with it than the way that we've dealt with it.

19 MR. ANDREWS: I understand that.

20 THE COURT: As to the other defendants, you
21 know, there's really no basis whatsoever to give the charge
22 and I know you make the same argument with regard to
23 defendant Mitchell, but again, I think the appropriate way
24 is, you know, if this jury should find, you know, that
25 there's malice, that they need to be given the opportunity at

1 least to consider this. So I'm going to do it.

2 MS. SHEEHAN: And if it will make you feel
3 better, Mr. Andrews, I mean the verdict sheet number 7 is
4 only going to have your defendant's name on it anyway so it
5 won't be any secret to the jury.

6 MR. ANDREWS: No, I understand that. What I'm
7 really saying is it heightens my concern that it be included
8 at all, not the particular language, I know there's no other
9 way to deal with the language. I understand that.

10 THE COURT: I understand your concern,
11 Mr. Andrews, and thought long and hard about it last night as
12 to whether it was appropriate to give it at all. But I think
13 based, again, on a liberal view of the evidence in
14 plaintiff's favor, that it needs to be given. Anything else
15 with regard to the charge? Okay. Let's head back to the
16 courtroom, get ready for closing statements. Yeah, go ahead.

17 MS. SHEEHAN: Your Honor, two quick comments
18 about the verdict sheet.

19 THE COURT: Oh, I'm sorry, the verdict sheet,
20 all right.

21 MS. SHEEHAN: Number II, damages, page 3.
22 Question number 3, did plaintiff prove by a preponderance of
23 the evidence that she sustained an injury, can we add
24 "attributable to defendants"?

25 THE COURT: Where are we talking again? I'm

1 sorry.

2 MS. SHEEHAN: Page 3, number 3.

3 THE COURT: Did plaintiff prove by
4 preponderance of the evidence that she sustained an injury
5 attributed to defendants, it has to be any injury first and
6 then I think you get to that afterwards, don't you? The
7 progression, the next one is causation. First of all, is
8 there any injury, that's the first step. Did she have an
9 injury, is there evidence to establish that, and then if they
10 say yes, then you go to causation, that the act or omission
11 alleged in the claim or claims -- find was the proximate
12 cause of the injury and/or emotional distress that she
13 suffered.

14 MS. SHEEHAN: Does that have to be sexual or
15 gender based?

16 MS. CONNOR: I don't think that belongs in a
17 verdict form, your Honor, what counsel --

18 MS. SHEEHAN: Right, I'm not ... in the claim
19 or claims of sexual or gender based, claims regarding sexual
20 harassment or gender bias, for which you find in favor of
21 plaintiff was the proximate cause of injury or injuries
22 and/or emotional distress that she suffered.

23 MS. CONNOR: I think the jury --

24 THE COURT: Go ahead.

25 MS. CONNOR: Your Honor, I think the jury

1 instruction covers that, and to add that to a verdict form is
2 not necessary and would complicate it as well. I think that
3 using the word claim or claims would encompass those, what
4 counsel is saying, and that this -- this form does cover and
5 directs the jury in the order of decisions.

6 THE COURT: It really is about directing them
7 through the process of how they make their decisions and not
8 instructing them once again on the law. But we'll take a
9 look at it.

10 MS. SHEEHAN: Because the problem is, so many
11 of the incidents that plaintiff testified to have nothing to
12 do with gender bias or sexual content, we heard a lot about
13 overtime, taping of glasses.

14 THE COURT: We'll take a look at it. Let me
15 talk to the clerks about it. My concern is I don't want to
16 get into instructions again in a verdict form. It's a
17 step-by-step process of how they have to decide this, and
18 we've already instructed them on, you know, what they should
19 consider in making those decisions, so -- but we'll take a
20 look.

21 MR. ANDREWS: I do have something that I think
22 speaks to the process and it's kind of related to the concern
23 I expressed about the instructions which is in 2a, did
24 plaintiff prove by preponderance of evidence that one or more
25 of the defendants, Burge, Graham and/or Mitchell sexually

1 harassed her, I think it lends itself again to the
2 interpretation one or more of defendants that, you know, it
3 could be together, that it could be the combination of them.
4 So I would propose that it say, Burge, Graham, and/or
5 Mitchell individually created a hostile work environment.
6 And that's the other thing, I think hostile work environment
7 is a little more appropriate given the instructions than
8 sexually harassed. But do you understand what my main point
9 is? When you read it by preponderance of evidence that one
10 or more of them sexually harassed her, it leads I think to
11 the inference, it leads pretty directly to the suggestion
12 that you can combine the conduct to find that they create a
13 hostile work environment when under Section 1983, it has to
14 be a finding against each of them individually. And this is
15 of course the written thing that they're going to have in
16 there assuming they're not going to have the jury
17 instructions.

18 THE CLERK: They have the jury instructions.

19 MR. ANDREWS: They do have the jury
20 instructions, okay. Well, still, it's what they're going to
21 be looking at when they make the decision.

22 THE COURT: So your proposed change would be
23 that --

24 MR. ANDREWS: To -- I'm sorry.

25 THE COURT: Go ahead.

1 MR. ANDREWS: After Mitchell, strike "sexually
2 harassed her" and insert "individually created a hostile work
3 environment."

4 MS. SHEEHAN: Your Honor, I disagree. I like
5 the idea of keeping it sexual, sexually harassed her.

6 MR. ANDREWS: That's not my main point, I
7 think hostile work environment is more appropriate
8 personally, but I'm not -- that's not really what I'm getting
9 at.

10 THE COURT: All right. We'll take a look. I
11 do tend to agree that to separate them out, that there has to
12 be an individual determination against each of them, and
13 that's why we have them listed, Burge, yes/no, Graham,
14 yes/no, Mitchell, yes/no.

15 MR. ANDREWS: But you could decide --

16 THE COURT: That's an individual
17 determination, it's not a determination of all of them.

18 MR. ANDREWS: But in your mind you could
19 decide that Burge and Mitchell together did if you count
20 those up, you know, so you know what I mean?

21 THE COURT: Yeah, I get your point.

22 MS. CONNOR: Your Honor, may I suggest that
23 with regard to that section, that the language could be
24 added, to sexually harass and/or created -- sexually harassed
25 and/or created a hostile work environment, put both in there.

1 MR. ANDREWS: I think that's completely
2 misleading, suggesting there's a separate standard.

3 THE COURT: Okay.

4 MR. ANDREWS: You know, I suggested hostile
5 work environment because that's really what the instructions
6 I think mostly talk about in terms of what needs to be
7 established, but you know, again, that's not my main point,
8 but to put both, you make it sound like there are alternative
9 findings that could be made, I think is way misleading.

10 THE COURT: Okay. We'll take a look and
11 we'll -- we're going to change a little bit with regard to
12 just the -- certainly with regard to their individual,
13 individual assessment of all of them, if it's not clear we'll
14 try to make it more clear. But again, we're talking about a
15 verdict form and not instructions. So we've got to keep that
16 in mind.

17 MR. ANDREWS: Okay.

18 THE COURT: All right.

19 MR. ANDREWS: Thank you, your Honor.

20 THE COURT: Okay. I'll see you in the
21 courtroom. I knew I should have told that jury 10:00.

22 MS. CONNOR: Your Honor, could we have a
23 personal break before the --

24 THE COURT: Yeah, go ahead now before you get
25 started, do what you need to do and then we'll meet you in

1 the courtroom.

2 (Proceedings in chambers adjourned, 9:54 a.m.)

3 (Court in recess.)

4 (Open Court, Jury Out, 10:17 a.m.)

5 THE COURT: Okay. I think we've got the
6 charge, everything addressed and it's being amended to
7 address some of your concerns, not all of your concerns but
8 some of them, and we'll have that to you as soon as we can,
9 okay.

10 Are we prepared to bring the jury in and do
11 closing arguments?

12 MS. SHEEHAN: Yes, your Honor.

13 MS. CONNOR: Yes, your Honor.

14 MR. ANDREWS: Prepared, your Honor.

15 THE COURT: Okay. Let's bring the jury in,
16 please.

17 (Jury Present, 10:17 a.m.)

18 THE COURT: Okay. Good morning, ladies and
19 gentlemen. We have the ladies and gentlemen of the jury,
20 plaintiff, plaintiff's counsel, defendants, and defense
21 counsel. You know, one of the things my wife always tells
22 me, and I'm going to put this the nicest way I can, what she
23 says about me is I'm optimistic about time, overly optimistic
24 about time, and how long it's going to take. I was thinking
25 yesterday I should tell you 10:00, and I was optimistic about

1 being done quicker, and being able to get to you by 9:30. I
2 apologize for the delay and making you wait back there.
3 We've taken care of a large number of legal issues, both
4 yesterday afternoon after you left and then again this
5 morning, so we're ready to go. And we're going to do --
6 we're going to have closing arguments at this point, we're
7 going to have three closing arguments, from state defendants,
8 Mr. Mitchell, and we'll hear from Ms. Connor on behalf of the
9 plaintiff. Okay, are we ready?

10 MS. SHEEHAN: We're ready, your Honor.

11 THE COURT: Go ahead.

12 MS. SHEEHAN: Good morning. I believe there's
13 at least one thing about this case that everybody who has
14 attended trial over the last seven days can agree, that this
15 is a sad case. This is a sad case because plaintiff has
16 experienced two life-altering events that most of us are
17 lucky enough to never have to experience one of them.

18 Childhood sexual assault. And a sexual
19 assault as an adult. Plaintiff has problems associated with
20 these events, but these problems were not caused by the
21 defendants. Defendants had no involvement in the childhood
22 abuse, and you heard the judge read you the stipulation that
23 the parties have entered into, that DOCS is not responsible,
24 liable, and was not involved in the sexual assault that
25 occurred January 2003.

1 DOCS hired Ms. Collins when she was 41 years
2 old. She came with problems. She came with the history that
3 she never disclosed to DOCS.

4 Why did she want to work for DOCS? Because
5 her husband was losing his job or he was getting laid off and
6 she needed the money, the benefits, the pension. Perfectly
7 reasonable. And she wanted a flexible schedule to go to
8 school. At 41 years old, knowing -- she knows her history,
9 she chose a job in an environment that at this time is
10 predominantly a male environment. That's the staff. Let's
11 talk about the inmates. She chose to insert herself in a
12 very violent environment, potentially violent environment.
13 Prison. And she worked at maximum security prisons that held
14 males that are the most notorious and most violent criminals
15 in the state of New York. That was her choice.

16 Let me start talking, talk about the female
17 handbook. We heard a lot about that. The handbook cautions
18 females about spreading rumors, gossiping, jealousy, and
19 suggests eating ice cream. Well, plaintiff received that
20 handbook at the academy. She never complained about the
21 handbook at the academy. She never complained about the
22 handbook at Sing Sing. She never complained about the
23 handbook at Sullivan. She never complained about the
24 handbook at Auburn. She complained about the handbook during
25 Mary Mayville's investigation of her complaint in November of

1 2005. Notwithstanding all that, there was no evidence
2 submitted, presented during this trial of any connection
3 between that handbook and the conduct that she testified
4 occurred.

5 Mary Mayville testified, she was the woman
6 with the short white hair, from diversity management, she
7 testified that the book had some good points. She didn't use
8 it during her training because she didn't like the fact that
9 it wasn't gender neutral. She wasn't required to use it.
10 She sat on a committee, the diversity committee that rewrote
11 the book. And what was the revision they made to the female
12 manual? They made it gender neutral. So the book was that
13 awful that they decided it would be beneficial for men to
14 also receive it?

15 Plaintiff received approval from
16 Superintendent Burge to become a diversity trainer. He also
17 approved for her to sit on the diversity committee, and her
18 testimony was, I sat on the committee, I attended two
19 meetings but they didn't have enough power, so I didn't
20 attend any more meetings. Well, Mary Mayville testified that
21 that committee rewrote the manual. Sounds like a pretty
22 worthwhile committee.

23 Superintendent Burge, what's his involvement
24 in this? Handling one grievance that complainant filed with
25 her union. She filed a grievance with her union over seven

1 minutes of overtime, and that Sergeant Wright yelled at her.
2 Her union, step 1 handled the overtime issue, and referred
3 Sergeant Wright yelling at her to diversity management.
4 Diversity management conducted an investigation, and found
5 that her claims were unsubstantiated. The documents are
6 going to go back to you in the jury room, and that document
7 from diversity management stating that Ms. Collins'
8 allegations that Sergeant Wright yelled at her can be found
9 in D24F. That is the extent of Superintendent Burge's
10 involvement. He never, and you heard it straight from
11 Ms. Collins, he never sexually harassed her, created a
12 hostile work environment, or discriminated against her based
13 on sex.

14 Let's talk about the Department of
15 Corrections. The Department of Corrections, no dispute, had
16 a system in place to handle complaints involving sexual
17 harassment and discrimination based on sex. They have a
18 whole office, it's called diversity management. A whole
19 division dedicated solely to handling these complaints. But
20 there's no evidence that plaintiff availed herself of this
21 office. She did not file complaints with them. The
22 superintendents or the unions brought Ms. Collins' complaints
23 to the office of diversity management. You heard testimony
24 that diversity management had a policy to suspend
25 investigations while somebody was out on stress leave. Well,

1 that didn't happen here.

2 Plaintiff met with Superintendent Graham on
3 November 9th, 2005. Twenty-seven days after he became
4 superintendent. On November 10th, plaintiff gave defendant
5 Mitchell a to-from memo listing a number of complaints she
6 had with him, and she gave, I believe it was the watch
7 commander a copy. And the person she gave the copy of that
8 memo to called Superintendent Graham, Superintendent Graham
9 asked that that memo be read to him over the phone, and he
10 instructed the individual to put the memo in his office and
11 lock the door. What did the superintendent do the next day?
12 He sent the memo to the office of diversity management.

13 November 29th, 2005. Mary Mayville took
14 plaintiff's statement regarding her memo, and the complaints
15 in the memo.

16 On December 7, 2005, plaintiff goes on medical
17 leave. She's on leave. January 25th, 2006, Mary Mayville
18 interviews and gets a second statement from plaintiff.

19 February 13th, 2006, Mary Mayville is
20 conducting her interviews with the two or three other people
21 she brought with her and she interviews Superintendent
22 Graham.

23 Plaintiff goes back to work March 27th, 2006.
24 There was no delay in diversity management's investigation of
25 her complaints. Plaintiff did not go back to work at Auburn.

1 She never stepped foot inside Auburn again after December 7,
2 2005. She went to Eastern.

3 You heard plaintiff's counsel on a number of
4 occasions refer to Superintendent Burge and Superintendent
5 Graham's referral of complaints to the office of diversity
6 management as paper pushing. It's not paper pushing.
7 Exhibit D6 is a copy of the Department of Corrections
8 directive for diversity management complaints, and this will
9 go back to the jury room with you. B1, a copy of any
10 complaint of discrimination received by a facility
11 superintendent via another agency such as a New York State
12 Division of Human Rights or the U.S. Equal Opportunity
13 Commission shall be forwarded to the office of diversity
14 management. The superintendent shall include any
15 documentation relative to the complaint. This directive
16 tells him he doesn't have a choice. The word "shall" means
17 he has to do it. And that's what he did.

18 The creation of the diversity management, the
19 existence of the diversity management office makes sense and
20 good business practice for the Department of Corrections.
21 They have a group of people that are investigating complaints
22 of things that happen in facilities versus the facilities
23 investigating complaints about themselves. It also gives
24 Department of Corrections a central depository of all
25 complaints so they know what's going on in their system.

1 They have 60 to 70 correctional facilities, and they can go
2 to one office. Commissioner can go to one office and find
3 out what problems are we having in the whole system.

4 Let's talk about Superintendent Graham. You
5 heard Mary Mayville testify that when she concluded her
6 investigation, she told Superintendent Graham, here is a list
7 of things that I want fixed. I want everything fixed and I
8 want it fixed in two weeks. I'll be back in two weeks. And
9 what happened? She came back in two weeks, and everything
10 was fixed, except for the bathroom keys for a bathroom that
11 had to remain locked because inmates pass by and for security
12 reasons, that could not be fixed.

13 Sandra Downey and I'm sure others testified
14 the main priorities of DOCS is health and safety of the
15 staff, the inmates, and security. Corrections officers, they
16 are the only people that stand between criminals and you and
17 me, and everyone in this courtroom.

18 In addition to doing everything Mary Mayville
19 asked him to do, Superintendent Graham was asked by Mary
20 Mayville's supervisor, Charles Harvey, to send memos to the
21 training -- weapon training officers, regarding their conduct
22 and immature language. He did that. Charlie Harvey gave him
23 a sample of a memo that he wanted sent, and that's the memo
24 that Superintendent Graham sent.

25 We heard about a number of issues, and what's

1 important here is, are incidents involving sexual harassment
2 and gender discrimination. We heard about condoms in a
3 lunchbox. Plaintiff had no knowledge, no idea who put them
4 there, and I submit that's not gender based.

5 Items thrown onto a plexiglass, onto
6 plexiglass, it's not sexual in nature. It's not gender
7 based.

8 She testified about hangups at Sullivan,
9 attempted to -- oh, and we heard Lieutenant, then Sergeant
10 Hoefling testified he tried to trace those calls but he
11 couldn't get the machine to work. That's not sexual in
12 nature, that's not gender based.

13 We heard about complaints that there's no
14 female locker room. Well, we heard Sandra Downey tell us,
15 superintendents have no control over capital expenditures and
16 the construction of a new locker room is considered a capital
17 expenditure.

18 We heard about Ms. Collins' rear end being
19 grabbed while she was walking up the stairs, but she made no
20 effort to ID the person, and she never availed herself of the
21 system in place at DOCS to handle, if she would have filed a
22 complaint, diversity management. She didn't file a complaint
23 with diversity management about that incident.

24 We heard about her pictures being defaced.
25 Curly hair, beard, admin. transfer, I submit that's not

1 gender based or sexual in nature. We heard the
2 superintendent, he had his picture defaced. Gave him a nose
3 6 inches off to the one side.

4 We heard a lot of testimony about glasses
5 being taped, not sexual in nature, it's not gender based.

6 We heard about Lieutenant Keenan offering her
7 an Italian sausage. Well, who did she report that to?
8 Sergeant Hoefling. A subordinate of Lieutenant Keenan. She
9 didn't report it to a captain, and Sergeant Hoefling didn't
10 report it. Sergeant Hoefling isn't being sued here.
11 Lieutenant Keenan isn't being sued here.

12 We heard about rumors that she was sleeping
13 with Sergeant Hoefling and Sergeant Bennett. I don't think
14 it's gender based, it involves men and women. Plaintiff
15 could not mention or identify one individual who spread the
16 rumor or who she heard the rumor from. She did testify that
17 the rumors did not last long.

18 Well, we have the officer pass gas at her and
19 then turned and passed gas at the inmates. Crude, sophomoric
20 behavior, yes; gender based, sexual, no.

21 We have Officer Tenori in Sing Sing who said
22 he would hook up with her before she left. She never
23 reported that to anyone. He's not being sued here.

24 We have Officer Germain who at academy
25 training said, women are hiding in the back, they can't keep

1 up. Personally it sounds like an observation. It's not
2 sexually based.

3 We heard about her time cards were missing.
4 She had no personal knowledge of what happened to the time
5 cards. It's not sexual based, it's not gender bias, but what
6 we do know is Ms. Collins admitted witnessing someone else's
7 time cards being destroyed, she did nothing about it. She
8 didn't interfere and she didn't file a complaint.

9 Ms. Collins only cared about the incidents
10 that affected her. Jokes, rumors, and graffiti. These
11 events were okay to happen to everyone else, but not her.
12 It's interesting, um, while she was at Auburn, there was a
13 female deputy superintendent, Superintendent O'Mara, and we
14 heard no testimony that she ever spoke to Superintendent
15 O'Mara about her issues, sexual assault or gender bias.

16 Plaintiff was transferred to a number of
17 facilities. Each and every transfer was at the request of
18 Ms. Collins. She asked to be transferred from Sing Sing to
19 Sullivan, from Sullivan to Auburn. We have the actual
20 transfer papers from Auburn to Eastern, and interestingly
21 enough, although Sullivan, we heard about all the horrible
22 things that happened there, what does she do in 2009? She
23 files for a transfer to go back to Sullivan. And her
24 testimony was, yes, her son was a corrections officer at
25 Sullivan, and she wanted to work with him.

1 We heard about complaints she had at Sullivan
2 and the superintendent of Sullivan isn't being sued here.

3 We heard about her transfer to Eastern, and
4 then Lieutenant Mitchell showed up, and that's where she
5 really had the breakdown and never went back to work again.
6 Superintendent of Eastern isn't being sued here.

7 Plaintiff does not have PTSD. And you heard
8 that from the author of the DSM, Dr. First. She told
9 Dr. First during the six-and-a-half-hour evaluation about her
10 childhood abuse, but she never mentioned the sexual assault.
11 When Dr. First was told about the sexual assault and he added
12 it to the equation, he testified he still -- his opinion was
13 still that she did not have PTSD. And he unequivocally
14 stated that she could and would get better with help. But
15 she never sought help, she never sought counseling, except
16 for a few isolated incidents.

17 Dr. Alley testified that the plaintiff asked
18 him to not put certain things in her medical records. Did
19 she not want to make a record because it would hurt her
20 lawsuit? We'll never know.

21 We do know there were other stressors in her
22 life. Marital problems, financial problems, her father
23 passed away. Her last child went off to college. I don't
24 think anybody disputes they're true stressors in the world.
25 Plaintiff testified that she did seek the help of a licensed

1 social worker and she saw him a number of times. Ray
2 Chernikoff [sic] (phonetic). We heard nothing about her
3 meetings, counseling, with Mr. Chernikoff. Dr. Alley had no
4 knowledge about her treatment with Ray Chernikoff.
5 Dr. Reagles, the damages person, had no information about her
6 seeing Ray Chernikoff and our expert, Dr. First, had no
7 knowledge. She didn't tell anyone and she didn't mention him
8 to you. She mentioned she saw him but we don't know what the
9 result of what she saw him for.

10 What is in the medical records, as Dr. First
11 opined, does not support plaintiff having PTSD. What has the
12 plaintiff done -- what did she do when she left DOCS, 2009?
13 We know she now has a degree in family and marriage
14 counseling, I believe it's a master's. And she's pursuing
15 that career. There was no evidence presented that she
16 attempted to find commensurate work, any other job in any
17 form any way. All we know is that she went to school.

18 I want to talk to you a little bit about
19 damages. Dr. Reagles did an analysis of damages, and he
20 starts with this chart, table 1. These exhibits have not
21 been moved into evidence, but these are the exact charts that
22 are in Dr. Reagles' report that will go back with you to the
23 jury and that will be Exhibit P81. Table 1 -- you know what,
24 I'm going to start with table 2, see how fast this will go?
25 Except for the accountants, I know this is -- table 2, where

1 Dr. Reagles lists for you Ms. Collins' salary levels. Well,
2 we heard Ms. Downey testify Ms. Collins wasn't hired at the
3 hiring rate. She was hired at the training rate which is
4 lower. Every one of these numbers is incorrect.

5 Table 3. Her estimated value of past loss of
6 earnings, well, the numbers he started with with her
7 estimated earnings are wrong, these are wrong, and in
8 addition, he added \$2,386 a year in guaranteed overtime, and
9 you heard Ms. Downey testify there's no guarantee of
10 overtime.

11 Table 4, this is estimated future and present
12 values of expected earnings. Well, it follows that scenario
13 one, her projected salary and what she would need to be paid
14 to be invested to bring her whole to date. Well, we know all
15 the salary information is incorrect so we know scenario one
16 is incorrect. And what do we know from Sandra Downey's
17 testimony? Ms. Collins never sat for the last sergeant's
18 exam that was offered while she was still employed so she
19 never had a chance of becoming a sergeant. You can't become
20 a sergeant without taking the exam. Scenario two is
21 completely irrelevant.

22 Estimated future and present values of
23 residual earnings. Well, notwithstanding the fact that he
24 started with the incorrect wages, he appreciated, there's
25 already incorrect wages, by the average cost of living.

1 Well, Ms. Downey testified that the raises and increases that
2 DOCS employees receive are from the negotiating contract,
3 percentages that are negotiated in union contract. Table 5's
4 wrong.

5 Table 6. Net loss of future expected
6 earnings. It's all based on incorrect numbers. It's
7 starting from the salary calculations that he made that are
8 all incorrect.

9 Table 7. Estimated past loss of pension
10 benefits. He calculated that at 8 percent of her expected
11 wages, well, we know his calculation of wages is incorrect.
12 So now we have table 7 along with the others, are incorrect.

13 Table 8. Estimated future and present values
14 of loss of pension benefits. I'm going to make the same
15 argument I just made. These are all calculated, one, the
16 sergeant scenario is completely irrelevant, she never had a
17 chance of being a sergeant and these are all -- these
18 calculations are all based on her expected salary which
19 Dr. Reagles used the wrong salary information. When you see
20 Dr. Reagles' report, you're going to notice that the only
21 contract that he mentions is the CSEA contract. Reasonable
22 person could conclude that he used the wrong union contract
23 in calculating his charts.

24 Loss of terminal leave benefit. Sandra Downey
25 testified no such benefit exists in the NYSCOPBA union

1 contract.

2 The next two tables -- oh, this table is
3 Dr. Reagles' specialty. Life care plan. He estimated about
4 11,000 for psychiatric care. Care there's been no evidence
5 she ever sought, she ever received or she's receiving now.
6 Personal adjustment counseling. Same thing. There was no
7 evidence that she ever received that care, she's going to
8 seek that care, or she is seeking that care now. The
9 medications, well, he calculated them at the highest brand
10 price, never taking into account that it might go generic and
11 we all know what happens with prescription drugs when they go
12 generic. We like that couple-dollar copay instead of paying
13 \$50 for a brand. I don't think there's any evidence that
14 she's still on these medications. I thought the lorazepam
15 hurt her stomach. This life care plan has no relevance to
16 Ms. Collins' current situation, or past situation. She
17 didn't seek these services.

18 Plaintiff's counsel's opening, she told you
19 that she was -- that plaintiff was here to seek justice. And
20 this is sad, but she can't seek justice here for the
21 childhood abuse or the sexual assault. What she's seeking
22 here from DOCS and from the defendants, if you look at
23 Plaintiff's 1, it's the complaint, and the last page tells
24 you she's looking for equitable relief for all back pay and
25 benefits, an award of all costs and disbursements in

1 prosecuting this action, and compensatory damages maximum
2 amount allowed by law or a minimum of a million dollars.

3 You heard Dr. Alley and Dr. First opine Miss
4 Collins needs counseling. The testimony is she never sought
5 counseling except for one or two sessions here and there and
6 she isn't currently seeking -- we don't have any evidence in
7 the record that she's currently seeking counseling. No
8 amount of money is going to cure Ms. Collins until she
9 decides she wants to be cured or she wants to seek help.

10 I think it's reasonable from the evidence that
11 the defendants did not create a hostile work environment by
12 discriminating against her or by sexually abusing her
13 sexually.

14 I'm going to circle back to Assistant Attorney
15 General Kinsey's opening, in which he said the defendants
16 can't fix what they don't know. There are only a few
17 incidents of that whole list of incidents I gave you, and I
18 will tell you, I'm sure I've missed some, very few of them
19 made it to complaint stage and the ones that did were turned
20 over to diversity management by Superintendent Burge or
21 Superintendent Graham. She didn't name any of the officers
22 involved in those incidents except for defendant Mitchell.
23 She never told DOCS about her history, she, just like
24 Sergeant Hoefling, she told him and asked him please don't
25 report all these incidents that I'm telling you about. She

1 asked her doctor not to report. All these things are being
2 kept a secret, and the defendants can't fix what they don't
3 know.

4 I think the testimony is pretty persuasive
5 that plaintiff didn't have the demeanor, the temperament, or
6 the emotional stability to be a corrections officer. We
7 heard a number of times where plaintiff broke down in the
8 prison over an incident that a reasonable person would not
9 have. Her picture, when she found her picture was defaced
10 with curly hair and a beard, or the one with the
11 administrative transfer written across it, she admitted she
12 became upset, totally stressed, and could not stop crying.

13 Superintendent Graham, he said it the best.
14 If you walk into a prison and the hair on the back of your
15 neck doesn't stand up, you don't belong in corrections.

16 Second to military service, jury duty is the
17 most important service you can give to your country. God
18 willing this Friday, my son will return from Afghanistan, and
19 that was -- he's a fighter pilot with the Air Force and
20 that's a career he chose. Each and every one of you, none,
21 you didn't choose to be jurors, sort of the jury system
22 selected you, and thank you, because I hope if you take only
23 one thing away from this experience, it's that you're the
24 only reason our system works. There's a reason why everyone
25 in this courtroom stands when you leave -- when you arrive

1 and when you leave. We just took seven days and counting of
2 your life away from you, from your family, from your school,
3 from your home, from your work. Thank you. The system, it
4 may be imperfect, but it's the best one in the world.

5 On behalf of defendants, Assistant Attorney
6 General Roger Kinsey and I would like to ask you to please
7 find that defendants did not create a hostile work
8 environment, did not violate any of her, plaintiff's
9 constitutional rights, and that we ask you to find in favor
10 of the defendants in this case. And we call it a no cause.
11 Thank you.

12 THE COURT: Mr. Andrews.

13 MR. ANDREWS: Your Honor, ladies and gentlemen
14 of the jury. In my opening statement, I told you that the
15 contacts between the plaintiff, Ms. Collins, and defendant
16 Mitchell were few and far between. Even if you believe all
17 of her allegations, I think that representation has been
18 borne out by the evidence, and as you'll hear when I talk
19 about the law a little bit and when the judge talks about the
20 law, that's a really important thing. So I wanted to remind
21 you that that's where we started, and I think that's more or
22 less where we're going to finish.

23 Troy Mitchell was at the wrong place at the
24 wrong time. The day after Ms. Collins met with the
25 superintendent of the prison, and he could not satisfy her

1 with regard to her complaints and he, you know, conceded that
2 yes, she had the right and the opportunity to sue in federal
3 court, the next day, Ms. Collins was assigned to Troy
4 Mitchell's area. On that day, she alleges that certain
5 statements were made, and I would suggest that that was to
6 support this lawsuit, to create a claim, and I'm going to
7 talk a little bit about specific reasons why I believe you
8 should not credit the plaintiff's testimony.

9 But my closing statement is going to take two
10 parts. First I'm going to talk about kind of those
11 credibility issues a little bit, what are some things you can
12 look at in deciding who's telling the truth; and secondly, I
13 am going to talk about the law some. And the reason why I'm
14 going to do that is because even if you credit all of
15 plaintiff's allegations, they don't add up to the type of
16 severe and pervasive conduct that is necessary to support a
17 claim of hostile work environment. And what the plaintiff
18 has done is brought an individual claim against Troy Mitchell
19 for hostile work environment, so she has to prove that he
20 created a hostile work environment as to her, and the
21 evidence, there's simply no construction of the evidence that
22 supports that.

23 Let's start with the facts alleged by
24 plaintiff, and I'm going to go in chronological order and
25 again point out some things you might consider in deciding

1 whether to believe these allegations or not.

2 The first thing she alleges happens was in
3 June of 2004 when Troy Mitchell allegedly said that women do
4 not belong at Auburn. I'm going to move this a little bit,
5 your Honor, if that's okay.

6 THE COURT: That's fine, wherever you like.

7 MR. ANDREWS: Out of my line of sight would be
8 terrific. Now, as is true of virtually every allegation
9 against Troy Mitchell, plaintiff has not produced any witness
10 to corroborate her testimony to support her burden and the
11 burden does rest with her, of showing that this incident
12 happened. It's also worth noting that this allegation
13 against Troy Mitchell that he said women don't belong at
14 Auburn was not raised by plaintiff at any time. Not only did
15 she not raise it on November 10th in the memo, it was after
16 that, so she had made numerous complaints about many things,
17 she never mentioned Troy Mitchell's name and even in her
18 November 10th memo when she complains about things that
19 allegedly happened on that day, and about things that
20 allegedly happened in the past, no mention of this
21 allegation. In fact, this allegation does not crop up until
22 after she brings her legal claim in January of 2006.

23 The next incident is the September or
24 October 2004 statements about an inmate's private parts,
25 okay. I think you know the testimony I'm talking about.

1 Once again, there's no evidence corroborating it, and once
2 again, plaintiff brought numerous complaints prior to
3 November 10th, 2005, written complaints, verbal complaints,
4 none of the written complaints mentioned Troy Mitchell's
5 name, there's no evidence that any of the verbal complaints
6 ever mentioned this allegation against Troy Mitchell or any
7 other allegation against Troy Mitchell.

8 Now, the next incident alleged happened in the
9 spring or early summer of 2005, and this is the wallet
10 incident and I'm a little bit at a loss as to why we have to
11 discuss this at all, given that the plaintiff admits that she
12 was wrong, she did something she wasn't supposed to, she
13 violated policy. You know, she complains that Sergeant
14 Mitchell, then Sergeant Mitchell removed the wallet from her
15 bag but admits that if he saw it as he testified,
16 uncontradicted, that he did, that he had a responsibility to
17 do that.

18 Now there's no corroborating testimony once
19 again, but what else, you know, can we look at to decide if
20 she's telling the truth or not? And what I would suggest is,
21 her claim that she called him a liar when he told her that he
22 had found her wallet. Now she claims that he said he found
23 it in the trash which he denies, but let's assume that's
24 true. How could she know that he was lying as to how he
25 found the wallet when she had no knowledge of how he found

1 the wallet? She admits she wasn't there. She admits the
2 wallet wasn't in her possession. She could have no idea how
3 Troy Mitchell came into possession of that wallet. And when
4 I asked her on the stand to explain how she could possibly
5 have thought he was lying at that point in time, how she
6 could justify that statement, which Troy Mitchell denies was
7 even made, she sat there quietly. She had no answer, because
8 it's not true.

9 The next allegations involve the episode on
10 November 10th, 2005. I don't think I have to point out to
11 you again, but I'm going to anyway, this is the day after the
12 meeting with the superintendent where he said, if you're not
13 satisfied with the response, you can sue.

14 Now, there are some things that we can agree
15 happened that day. Not only did she have some motive to come
16 up with some allegations because of the superintendent's
17 statements the day before, we all agree that her glasses were
18 taped on that day, she was very upset about that, and she was
19 very angry at Troy Mitchell that he would not relieve her
20 from duty. She said she was angry about it. She said she
21 was angry about the taping, she was upset he wouldn't relieve
22 her from duty so not only does she have some motive to create
23 some allegations, she has motive against Troy Mitchell to
24 create some allegations.

25 Once again, I would point out that she's

1 presented no evidence, no corroboration to support her side
2 of the story with regard to this, and what I would ask you is
3 this: She talked about how upset she was at Troy Mitchell
4 making some comments about his gastrointestinal system, about
5 walking around naked in front of his family, about commenting
6 on his mother's breasts, and about commenting on his wife
7 losing something up his rear end. These are people, as we've
8 heard throughout this proceeding, who on a daily basis are
9 exposed to violence, all sorts of gross behavior, prisoners
10 masturbating in their cells, you know, is this really
11 something that is gonna send a prison guard who belongs in
12 that environment over the edge? That's gonna make her so
13 upset that these things left her supposedly unable to
14 function? I would suggest to you that's simply not credible.

15 Now there's some other incidents alleged on
16 November 10th, 2005, and although they have absolutely no
17 sexual content to them, I think they are important in terms
18 of your deliberations, in deciding who's telling the truth in
19 this proceeding. Ms. Collins talked about some hangup calls
20 that were made and some items being thrown on the plexiglass.
21 She claims those incidents were harassment. Regarding the
22 hangup calls, right in the memo she wrote, she acknowledges
23 that she was told that this happens all the time, that it's
24 not aimed at her, and she says, gee, if that's the case, you
25 might want to look into this a little bit. You know, that's

1 hardly a statement, even in her own memo, that this is
2 harassment against her.

3 But do we have additional evidence? Yes. You
4 heard Jami Kaplan from the New York State Division of Human
5 Rights say that during her investigation, the plaintiff
6 confirmed that -- I want to get this right -- that those
7 calls happened to everyone. How is that harassment against
8 the plaintiff if the calls happened to everyone as she
9 acknowledged during the State Division of Human Rights
10 investigation?

11 The plexiglass, very similar. You know, she
12 now claims that was harassment. That's not something she
13 even bothered to put in the memo, and maybe the reason she
14 didn't bother to put it in the memo is, as she said to Jami
15 Kaplan during the State Division of Human Rights
16 investigation, she had not taken that personally. But now
17 it's harassment. Is that credible? I would suggest to you
18 that it's not. Her story has changed. Things that, you
19 know, happen to everyone and that she didn't take personally
20 are now harassment.

21 But in any event, I want you to remember that
22 there's no reason to hold Troy Mitchell responsible for
23 either of those things. She doesn't suggest, not only that
24 he taped the glasses, she doesn't suggest he threw anything
25 on the plexiglass, she doesn't suggest he made any phone

1 calls. So again, it's a little like the wallet incident, I'm
2 a little bit at a loss as to how this relates to allegations
3 of harassment against Troy Mitchell.

4 Now speaking of having changed stories, I'd
5 like to talk a little bit about the allegations that happened
6 at Eastern Correction Facility supposedly, which, you know,
7 we heard in counsel's opening statement supposedly were
8 retaliation against the plaintiff. Well, you're going to
9 hear her suggest now not that it was retaliation, but that it
10 was further acts of harassment. So let's talk about those
11 incidents a little bit.

12 Now, again, neither of these things obviously
13 have any sexual content to them, but plaintiff testified that
14 Troy Mitchell sat in the chair by an exit with the purpose of
15 preventing her from passing by her. That's plainly absurd.
16 You know, apparently among her skills is mind reading,
17 because she can have no idea what Troy Mitchell's intent was,
18 if he was sitting in a chair next to an exit. It just --
19 that's not evidence of anything.

20 Similarly, you know, she testified in her
21 direct examination about Troy Mitchell having walked out in
22 the yard and stared at her and that's what she said. She
23 said -- I hope, you know, people caught this. She said he
24 walked out in the yard and stared at her. And I questioned
25 her on cross-examination about that and then afterwards, she

1 changed her story a little bit. It was now a leer, and a
2 laugh. It went from a stare to a leer and a laugh. And I
3 would suggest to you that that's the same way most of these
4 allegations against Troy Mitchell were created. That one you
5 got to see right in front of your eyes.

6 Now, I think it's also really important
7 relative to her credibility and whether these things happened
8 at Eastern at all, to remember the testimony of Dr. Alley.
9 Dr. Alley had a very detailed note in his office notes about
10 September 29th, 2006, the day that plaintiff came in
11 complaining that Troy Mitchell had been at Eastern. And as
12 you heard, he had transferred to Eastern on September 11th so
13 he had been there for weeks already, and at that point, you
14 know, apparently she was unable to continue working.
15 Dr. Alley conceded that she never mentioned, plaintiff never
16 mentioned these alleged incidents of misconduct against Troy
17 Mitchell, they weren't in his notes. You would think that if
18 there were specific incidents as opposed to the fact of his
19 transfer that caused her a problem, if there were specific
20 incidents, it's something she would have remembered, it's
21 something he would have noted and/or remembered.

22 Now I'll point out one more thing about this
23 allegation about Eastern. When you look at the complaint,
24 Plaintiff's Exhibit 1, you'll see an allegation that the
25 transfer was retaliatory. You won't see any mention of any

1 supposed misconduct on the part of Troy Mitchell at Eastern.
2 It's just not there. Just like it's not in Dr. Alley's
3 notes, and those should not be believed either.

4 Now there's a little more information that
5 Dr. Alley gave us that, again, could cause one to question
6 plaintiff's overall credibility. She went to him in December
7 of 2005 and said she could no longer work at Auburn
8 Correctional Facility, and she did mention talk about
9 bringing a suit, but when she brought her claim in January of
10 2006, she never mentioned it to him. And I don't know if you
11 remember, but I asked Dr. Alley about this and he sat there
12 quietly for a second, he said no, she never did tell me about
13 that. And you know, maybe it's my imagination, but I could
14 see the wheels turning and I think Dr. Alley was realizing
15 for the first time that maybe he had been played. Because
16 after she filed that claim, she went in and she, you know,
17 described her symptoms and all her distress, everything she
18 would need to bring this claim in court, without ever telling
19 him that, yes, I have in fact brought that legal claim,
20 something you think would be a pretty big thing in the life
21 of a person suffering from an adjustment disorder as a result
22 of some misconduct. I think that would have been worth
23 mentioning, but she didn't.

24 The other thing that I thought was striking
25 about Dr. Alley's testimony was his admission that if there

1 were only two incidents involving overtly sexual conduct that
2 involved Troy Mitchell, and I'm afraid I'm going to have to
3 go through them again in a second, but that's how many there
4 were, there were two, and that's being generous about what
5 has sexual content, if there were only two, Dr. Alley said,
6 she's, that's -- that misled him, that would not be
7 consistent with what she had expressed to him. He confirmed
8 that that would not be consistent. So that's not coming from
9 me. That's not coming from Troy Mitchell. That's coming
10 from Dr. Alley, that the actual allegations against my client
11 don't match up with what was described to her own doctor.

12 Troy Mitchell's testimony was delivered
13 consistently. It was forthright, and it was given with the
14 confidence of a person who knows they're telling the truth.
15 I would suggest to you also that Troy Mitchell's testimony
16 stood up to cross-examination better than any other witness
17 who appeared in this proceeding. So you've got on the one
18 hand a plaintiff whose story changed, who came up with things
19 she had never mentioned before, who didn't mention things to
20 her doctor that she should of on the one hand, and you have a
21 very forthright and straightforward witness whose testimony
22 never wavered on the other hand, and I would ask that you
23 take that into consideration.

24 The writer Mitch Albom who wrote some books
25 you might have heard of, Tuesdays with Morrie, The Five

1 People You Meet in Heaven, I don't know if this rings a bell
2 to anyone, but he wrote in one of his books, that the more
3 you have to defend a lie, the angrier you become. There's no
4 question that the plaintiff is angry at Troy Mitchell, but
5 that doesn't mean he did anything that she alleged that he
6 did.

7 Now I'd like to talk to you about the law.
8 You've been very patient, I really appreciate it, but I need
9 to, you know, give you a little bit of my view, and obviously
10 the judge is going to instruct you on what the law is. I'm
11 not suggesting you should take what I say instead of what he
12 says. I'm hopeful that what I say will be consistent with
13 what the judge says. Okay.

14 To support a claim for sexual harassment
15 against Troy Mitchell, the plaintiff has to demonstrate
16 obviously that the conduct actually occurred, and that's what
17 I've just been talking about, but because she alleged that he
18 sexually harassed her in his personal capacity, in other
19 words, he personally sexually harassed her, there are certain
20 standards that have to be satisfied. It has to be proved
21 that he, by himself, established a hostile working
22 environment for plaintiff. The judge I believe will instruct
23 you that a hostile work environment is a workplace so
24 permeated with discriminatory intimidation, ridicule, and
25 insult that a reasonable person would consider it to be so

1 severe and/or pervasive as to alter the conditions of her
2 environment, creating an abusive working environment. By
3 himself, that he did all that.

4 There's going to be some discussion of some
5 things that you can consider, some kind of factors that come
6 up a lot in making this kind of determination, and the judge
7 will explain that you can consider the frequency of the
8 conduct, the severity of the conduct, whether the conduct was
9 physical or just verbal, whether the conduct was humiliating,
10 whether the conduct was a mere offensive utterance, and
11 whether the conduct unreasonably interfered with the
12 plaintiff's work performance.

13 So although I've described reasons why I think
14 you should not credit the plaintiff in her allegations, from
15 this point forward, I'm going to assume that the law requires
16 you to give credence to her allegations. We're going to
17 accept all of it as true, and let's look at each of these
18 factors briefly.

19 First, what was the frequency of the conduct?
20 Starting with the first allegations against Troy, the comment
21 that women don't belong at Auburn was June 2004. The two
22 alleged comments about an inmate's private parts were three
23 to four months later. The wallet incident was eight or nine
24 months after that. The November allegations, November 10,
25 were another five months down the road, and the alleged

1 incidents at Eastern were ten months later. I don't think
2 that's frequent. I don't think that's pervasive. That's
3 obviously something for you to decide.

4 Now, if you focus on the -- just on the two
5 incidents that actually had any sexual content to them, the
6 statements about the inmate private parts and the allegations
7 of November 10, 2005, you're talking about a 13- to 14-month
8 hiatus in between those two events. Again, nothing close to
9 pervasive.

10 Let's discuss the severity of the conduct
11 alleged against Troy Mitchell. There's no suggestion that he
12 assaulted plaintiff, there's no suggestion that he touched
13 her in any way. No suggestion that he pressured her for
14 sexual favors. There's no suggestion that he discussed her
15 anatomy. Nothing like that. Nothing personal to her. And
16 you heard her admit that the November 10, 2005 allegations
17 which supposedly triggered all this, she admitted, it had
18 nothing to do with her sexually, nothing.

19 Now, don't let plaintiff's counsel suggest
20 that any statements were more severe because they happened in
21 front of the inmates and that increased the ridicule, the
22 impact of ridicule for this reason. Only the November 10,
23 2005 allegations involve -- against Troy Mitchell were
24 allegedly in front of inmates. Only those comments on
25 November 10, 2005. None of those were about plaintiff. They

1 were all about Troy Mitchell and his own family. If anybody
2 was humiliated or subjected to ridicule by inmates if they
3 were listening, by statements as alleged, it was Troy
4 Mitchell. It wasn't plaintiff.

5 Now the next factor is whether the conduct was
6 verbal, physical, or both. We know that all of the conduct
7 here alleged was verbal.

8 The next factor is whether the conduct was
9 humiliating, and again, only two episodes, 14 months apart,
10 had any sexual content and the November 10th ones, there's no
11 way to construe them as being humiliating to her.

12 The next factor is whether the conduct was a
13 mere offensive utterance. And to the extent -- you know,
14 overwhelmingly that's what we're talking about, are things
15 that were mere offensive utterance. Of course the
16 allegations at Eastern don't involve any words at all.

17 Finally, you can consider whether the conduct
18 unreasonably interfered with plaintiff's work performance.
19 The only evidence I heard involving Troy Mitchell of any
20 interference with plaintiff's work performance had to do with
21 the taping of her glasses which he didn't do. Now did she
22 ask him to be relieved? Yes. Did he turn down that request?
23 Yes. Is there any evidence that she wasn't able to do her
24 job the rest of the day? No. None.

25 When we talk about severe and severe and

1 pervasive in the law, is the severe, the kind of thing that
2 can happen once or rarely to support a claim, something like
3 a sexual assault, you know, that's severe. I think we all
4 agree to that. Nothing here is remotely close to severe.

5 Obviously you've heard the time frame so I
6 would also suggest that the conduct was also not pervasive.

7 The judge is going to instruct you about
8 something called qualified immunity. It's another reason why
9 you could find that Troy Mitchell was not liable. Because
10 Troy Mitchell cannot have known on these facts, even if you
11 assume them to be true, that there was a violation of
12 plaintiff's constitutional rights. No facts. And for that
13 additional reason, Troy Mitchell also should not be found
14 liable.

15 Now there's no doubt that plaintiff is a
16 damaged person. Some terrible things have apparently
17 happened to her in her life, and that's something, you know,
18 she's deserving of sympathy for, but that isn't something to
19 award her damages for in this proceeding. It just isn't.
20 She has not sustained her burden of proof against Troy
21 Mitchell and her allegations are not worthy of belief. She
22 didn't prove it. It's her burden. She did not prove it. I
23 ask that you find that the plaintiff has not carried her
24 burden in this lawsuit, and I ask that you find for defendant
25 Troy Mitchell.

1 I thank you very much for your service and for
2 your attention, and for your consideration. Thank you very
3 much.

4 THE COURT: Ms. Connor.

5 MS. CONNOR: Your Honor, and ladies and
6 gentlemen of the jury. The plaintiff Penny Collins and I
7 would like to thank you very much for your time, attendance,
8 and attention to the evidence in this case. We understand
9 completely that serving on a jury is very inconvenient to
10 you, takes you out of your life, your situation, your
11 routine, your home, you come to court every day to listen to
12 this evidence.

13 This trial has been significantly long, put it
14 that way. Is this working? Yeah, that's a little better
15 maybe. This trial has been very long, and we very much
16 appreciate your service, and your attention to all of the
17 evidence in this case.

18 Now, at the beginning of this case, it was
19 explained to you that this is a case about sexual harassment
20 and gender discrimination of the plaintiff during her
21 employment with the New York State Department of Corrections.
22 Now the story that the plaintiff has told you is one where
23 her optimistic career at the New York State Department of
24 Corrections was ended, because of the injuries she incurred
25 as a result of the sexual and gender harassment that she

1 faced on a pervasive basis.

2 Plaintiff faced as a routine and pervasive
3 part of her employment at the New York State Department of
4 Corrections this type of harassment and there was a failure,
5 complete failure on the part of the employment -- employer,
6 rather, to take prompt and effective remedial action to end
7 this harassment.

8 Now you have heard in closing statements by
9 counsel that plaintiff came to the Department of Corrections
10 as a damaged person. I submit to you there is absolutely no
11 evidence in the record to support that. You have in the
12 record before you the plaintiff's employment evaluations, you
13 have that all the way from her academy through the time she
14 stopped effectively working for the Department of
15 Corrections. And in these evaluations, they'll be before you
16 to look at in the jury room, I ask that you look closely at
17 these, because you will see that she received excellent
18 evaluations, you will see that category after category, she
19 got good to excellent, good to excellent, good to excellent,
20 until the harassment became so severe that it started to
21 affect her. And then what happened in these employment
22 evaluations, is that the other areas of her performance
23 remain good to excellent, but the area about her getting
24 along with others after she started making a complaint, that
25 area was marked down, and you'll see supervisor's comments.

1 I also, we also ask that you look at these performance
2 evaluations, and you look at the supervisor's comments about
3 her good actions and conduct prior to the harassment
4 beginning in Sullivan.

5 There is no evidence that the plaintiff is
6 required to walk into an employer and say, I've been sexually
7 abused as a child. There's no evidence that the Department
8 of Corrections requires that. And that the assault, the
9 sexual assault that we stipulated to, if you note the date of
10 that, is January 1st, 2003, which is after the plaintiff
11 began her employment with the Department of Corrections. So
12 certainly with that date, you cannot infer that the plaintiff
13 had a duty to disclose something that hadn't even happened.

14 Now, the plaintiff's testimony and the
15 evidence presented in this case establishes that she began
16 her career in the Department of Corrections in an atmosphere
17 where women corrections officers and trainees were faced with
18 stereotyping and disparate treatment at the academy. The
19 evidence is established that at the academy women were given
20 separate instruction, specifically about how they should get
21 along with others and inmates and that this portrayed women
22 as weaker than men and needing some sort of special help.
23 This is the atmosphere that began at the academy and
24 continued throughout plaintiff's employment.

25 You heard evidence and will see this handbook,

1 the female handbook for women in corrections. If you look at
2 that handbook, you will see on pages of that handbook the
3 Department of Corrections attitude about women and the
4 stereotyping about women working in corrections. You will
5 see that they portray women as weaker, as gossips, as
6 rumormongers, they need to be told not to be flirtatious.
7 And they're even told not to ask for overtime so that they
8 can attend to their families because they are the chief
9 person in charge of their -- or taking care of their
10 offspring.

11 This type of attitude permeated the academy
12 and permeated various places that plaintiff worked in the
13 Department of Corrections. The evidence established that
14 this handbook was published by the office of diversity
15 management, and this is the office where plaintiff was
16 supposed to go to complain about the harassment that she
17 faced or any discrimination that she believed that she was
18 subjected to.

19 So rather than being a department that would
20 be neutral, and a department that would take a neutral look
21 at the situation and investigate, we have a plaintiff, the
22 complaint procedure of the employer suggests that the
23 plaintiff should go to the department that published the
24 discriminatory manual to begin with.

25 Now, after leaving the academy, Penny Collins

1 looked forward to a new career in corrections. She testified
2 she needed the job for the money and benefits for her family
3 but this was a career, as you saw throughout the evidence in
4 this case, that was not to be. She faced pervasive
5 harassment from almost the beginning of the career, her
6 career shortly after leaving Sing Sing to the point that,
7 which she left her career at the end of her efforts to work
8 for the Department of Corrections.

9 Now I want to summarize for you, and I don't
10 want to -- you've heard a lot about these incidents but I
11 want to summarize for you so you can see how pervasive and
12 severe this harassment that she faced was.

13 Now first at Sing Sing, plaintiff was grabbed
14 between the legs by another officer, and degraded at lineup
15 in front of inmates.

16 She transferred to Sullivan, and she was
17 subjected to pervasive harassment there where rumors were
18 prevalent about her sleeping with sergeants in order to get
19 favorable assignments, in order get good assignments in the
20 chart office. She was subjected to constant hangup calls on
21 her posts that interfered with her doing her job. And these
22 calls were not just simple hangups. If the callers didn't
23 hang up, they asked her questions such as -- about her sexual
24 habits, such as, are your knees dirty yet? And we know what
25 that's referring to, referring to oral sex. Don't forget to

1 clean the floor, F'ing Hazel, degrading her as a woman, she's
2 supposed to clean. Comparing her to a maid called Hazel.
3 Plaintiff also found condoms in her lunchbox. I would submit
4 to you that this is clearly a gender-based act. To say that
5 that is not gender based, it has no basis whatsoever.

6 She -- Lieutenant Hoefling came in here, now
7 Lieutenant Hoefling, and testified about the rumors and the
8 actions that Ms. Collins was subjected to, and he testified
9 about signs that were put up in front of the chart office
10 that hinted or suggested that there was some sort of affair
11 between Ms. Collins and Lieutenant Hoefling. Both of them
12 denied such an affair.

13 Now, Lieutenant Hoefling also testified about
14 the rumors from another lieutenant, and that he was sleeping
15 with the plaintiff, and if he wasn't, that lieutenant must
16 be. This is the type of supervisors and this is the type of
17 upper echelon superiors that the plaintiff had to deal with
18 in her employment at Sullivan. This same lieutenant talked
19 to her about having a sausage in his pants for her and he
20 told her at lineup that he had seen her breasts and she had
21 nothing to worry about. This is very severe harassment.
22 This is done in front of other people, it is done to
23 humiliate and degrade the plaintiff.

24 Now, there's been a claim made that the
25 Department of Corrections did not know about these matters.

1 The contrary is true and the evidence supports it.
2 Ms. Collins reported all of these incidents to her
3 supervisors at Sullivan and to the superintendent in
4 Sullivan. She spoke to the superintendent, she wrote a
5 lengthy memo about it and testified about that memorandum.
6 She gave specific times and dates of the phone calls, she
7 asked for an investigation. She gave extension numbers, she
8 gave very specific information. And she also reported the
9 lieutenant who made these comments to her. She suggested or
10 asked for additional sexual harassment training at that time
11 believing that might do some good. And she asked for an
12 investigation to be conducted.

13 Now, nothing was done by the Department of
14 Corrections to change this situation other than Lieutenant
15 Hoefling attempting to trace the calls which apparently were
16 unsuccessful.

17 Now the defendants have provided no evidence
18 other than that that the superintendent of Sullivan did
19 anything directly in response to her complaints.

20 Now after she reported these problems to the
21 superintendent at Sullivan, Ms. Collins' time cards were
22 missing. Now you've heard the defendants claim that certain
23 things like time cards have no sexual content. They don't.
24 That's not saying that there was some sexual favor requested,
25 but you can infer in the context of this pattern of behavior

1 that this was done to Ms. Collins because of her gender,
2 because of her sex, and that these were gender-based acts.
3 You can make the inference that the circumstances warrant
4 that these harassing acts that have no overt sexual statement
5 in them were done because she complained about harassment and
6 they were further acts of harassment.

7 Now the time cards, to remind you, were in a
8 locked box and that only certain people had keys to those
9 boxes.

10 Now you will also remember that Ms. Collins'
11 photo was defaced at Sullivan. Again, defendants claim this
12 is not gender based, but again, we submit to you that you can
13 make the inference given the pattern of conduct and what has
14 occurred that this was based on her gender. It was based on
15 her sex.

16 Now, one thing I would ask that you look at in
17 this evidence is that the defendants put on no witnesses
18 whatsoever that contradicted anything that Ms. Collins said
19 or Lieutenant Hoefling said about what occurred at Sullivan.
20 There's no evidence that anything that they testified about
21 or you've -- or you'll have evidence in the documents, that
22 that evidence is not true. There is no defense, there were
23 no defense witnesses that contradicted any of that evidence.

24 Now, at the end of June 2004, Ms. Collins
25 transferred to Auburn. And before she left, she utilized the

1 employees' complaint procedure. She filed a complaint with
2 the office of diversity management. And you will see in the
3 directive before you about filing complaints, that the person
4 who's got a complaint goes to the superintendent and then
5 that is given to the office of diversity management. So
6 therefore, the evidence is clear that Ms. Collins did follow
7 the procedure and file the complaint.

8 She spoke to someone in the office of
9 diversity management in July 2004, and that's the only time
10 she heard anything from that office until about three months
11 later, when she got a letter that the complaints were
12 substantiated. Excuse me. But the letter stated that the
13 investigation was unable to identify the perpetrators.
14 There's no -- there was no evidence about which acts they
15 were unable to identify the perpetrators. It's kind of a
16 generic letter that doesn't contain any information about
17 what the office did or anything, that any part of their
18 investigation or any efforts that they made.

19 Now we submit that this three-month gap in
20 time is insufficient employer action to promptly prevent
21 additional harassment or to remedy the past harassment. The
22 letter states that appropriate action will be taken, but yet
23 it doesn't say what that action is. Ms. Collins was never
24 informed of what the action is or anything that the
25 department did concerning her complaint.

1 Now the harassment from Sullivan carried over
2 to Ms. Collins' employment at Auburn. You can look at this
3 as a continuous form of harassment. There were unfounded
4 rumors pervasive at Auburn that she had arrived at Auburn as
5 an administrative transfer from Sullivan because she had sued
6 sergeants at Sullivan. So she was being labeled a rat among
7 her fellow officers because she had dared to complain about
8 harassment at Sullivan.

9 Now on her second day at Auburn, Sergeant
10 Mitchell told Ms. Collins that women don't belong at Auburn.
11 That was her greeting from Sergeant Mitchell. Now we've
12 heard that he's denied saying this, but you as the members of
13 the jury have the ability to judge the credibility and the
14 testimony and decide who was believable.

15 Now Ms. Collins testified also that her
16 picture was posted by the control room and was defaced with
17 administrative transfer written on it. This fueled the rumor
18 that she had been transferred to Auburn because she was a
19 problem at Sullivan. The defendants did not refute that the
20 picture was defaced, nor that she was the subject of
21 unfounded rumors.

22 Now, a few months after she got to Auburn the
23 rumors manifested themselves in Sergeant Wright's treatment
24 of her. She testified she went to Sergeant Wright about
25 switching duty with another officer when Wright screamed and

1 yelled at her, slapped his arm, and -- his sleeve where the
2 stripes were and he pulled his nametag forward and said,
3 Wright, spell it right. Now you can draw an inference that
4 he did that because he believed that Ms. Collins was a
5 complainer, somebody who was going to file complaints,
6 somebody who was going to write his name down and turn it in.

7 Now the defendants are claiming that this is
8 not an act of sexual harassment, but we believe that the
9 circumstances around this act, you can, is part, we -- you
10 can, you can understand or draw the inference that it's part
11 of this pattern of harassment.

12 Now the abuse from Sergeant Wright continued
13 when Ms. Collins asked him about obtaining some overtime in
14 December 2004. We've heard a lot about this overtime.
15 Again, Sergeant Wright treated her in a demeaning manner,
16 screamed and yelled at her in his office about this seven
17 minutes of overtime.

18 You've heard in defense counsel's opening
19 statement that she was making a big deal about these seven
20 minutes of overtime. But if you look at the circumstances
21 around this, you look at Ms. Collins' testimony, you look at
22 the documents that you will have in the jury room, her
23 complaint was not about the approximate \$5 or little more
24 related to this amount of overtime. Her complaint was about
25 her treatment, about the abuse and about the disrespect she

1 received as a woman in Sergeant Wright's office. The issue
2 with Ms. Collins has always been that she be treated with
3 dignity and respect. And this was very manifest, you can see
4 it in the evidence before you concerning Sergeant Wright.

5 Now, Ms. Collins did avail herself of the
6 grievance procedure to complain about that. And she
7 testified that she did that because other officers felt that
8 if she didn't go for the overtime, it would hurt them.
9 That's very reasonable. And she also spoke to the office of
10 diversity management about this and filed a complaint about
11 that.

12 But despite doing this, the harassment at
13 Auburn continued and escalated. Shortly after this, she was
14 subjected as the only female in the training class, she was
15 subjected to sexually offensive statements by the weapons
16 training officer comparing the gun's barrel to a penis and
17 the bullets to ejaculate. There's no other way to say it.
18 The officer, the instructor stroked the barrel of the gun
19 suggestively and described his sexual habits with his wife.
20 Now Ms. Collins, being the only female, was very offended by
21 this conduct, and in front of her classmates. She testified
22 that it was -- she told him it was disgusting. Now she
23 complained about this, she reported this to the office of
24 diversity management.

25 Now after this weapons training officer

1 incident, that same summer, the evidence would show that
2 Sergeant Mitchell removed her wallet from a lunchbox and lied
3 to her that he had found it in the facility. Now the defense
4 has argued that these are not sexual in nature, these acts
5 are not sexual in nature, but Ms. Collins contends that
6 Sergeant Mitchell's conduct was directed at her because she's
7 a female, because you remember, he said in her second day
8 that women do not belong at Auburn.

9 Now after taking her wallet and lying to her
10 about where he found it, Sergeant Mitchell claims he told
11 Lieutenant Quinn about the incident. Well, this is very
12 interesting because if he was not trying to get Ms. Collins
13 in trouble with the wallet and taking it back to her in order
14 to avoid getting her in trouble, then there's no explanation
15 of why he would tell Lieutenant Quinn. The only possible
16 explanation would be that he was telling Lieutenant Quinn
17 because he was trying to protect himself against Ms. Collins'
18 accusation that he had lied to her, that she had called him a
19 liar.

20 Ms. Collins -- we submit that Sergeant
21 Mitchell's motive can be inferred from this evidence, and
22 that he was trying to make trouble for Ms. Collins because
23 women do not belong at Auburn.

24 Now you heard some statements by defense
25 counsel in their closing that there was a Deputy

1 Superintendent O'Mara at Auburn, a female. We submit to you
2 that there is no evidence that that deputy superintendent was
3 there when the plaintiff Ms. Collins was there.

4 Now, granted, some of these problems that
5 Ms. Collins faced were more serious than others. We're not
6 saying everything is exactly the same. It's not a level
7 playing field, but what we're urging you to do is look at the
8 totality of conduct here. Look at all the circumstances what
9 were adding up for Ms. Collins, and I'm not hitting all of
10 them, I'm not going to go through all that evidence, I know
11 you've heard it, I know you've been paying attention, but
12 we're urging you to look at this totality of conduct and the
13 cumulative effect of these issues and how they began to wear
14 on Ms. Collins. This clearly had been -- become a hostile
15 environment for her at the Department of Corrections.

16 Now what did she do about this? There's so
17 many different pieces of evidence of what she did. Different
18 complaints, different conversations, but one of the things
19 that I want to draw to your attention is that she went to see
20 Superintendent Graham about this shortly after he arrived at
21 the Auburn facility. And it seems as though the defense is
22 asking you to infer that there was something wrong with her
23 doing that and I think to the contrary, you can draw the
24 inference that she was trying to take quick action to change
25 the circumstances when a new superintendent came in.

1 Now you have in evidence to read a memorandum
2 that Ms. Collins wrote to Superintendent Burge, the one
3 before Superintendent Graham, about discrimination and sexual
4 harassment in Auburn. And it says in this memo that the
5 harassment is on a continual basis, the memo informs the
6 superintendent of that. She expressed to him that the
7 practices occurred so frequently she found it hard to believe
8 that the administration would be unaware of them. She told
9 the superintendent, and you'll have the memo to look, that
10 Auburn is not a female friendly facility, and that she's been
11 harassed, humiliated, and touched in a sexual way while
12 working at Auburn. She told him that fellow officers and a
13 supervisor told her women don't belong at Auburn. And she
14 told him she felt more hostility from those who wore the blue
15 uniform, the officers, than those who wore the green, the
16 inmates. That is a very sad state of affairs.

17 Now you heard Superintendent Burge testify
18 that she didn't go into specifics in this memo. But you also
19 heard him testify on cross-examination that he didn't notice
20 in the memo that she reported that she had been sexually
21 touched and told by officers and supervisors that women don't
22 belong in Auburn. He didn't remember that.

23 Now Superintendent Burge testified that he
24 turned this memo over to the office of diversity management
25 to investigate. Ms. Collins submits that this procedure,

1 this turning over the memo, contained in the directive, is
2 insufficient to remedy the harassment. Superintendent Burge
3 was apparently on his way out of Auburn at the time, he had
4 been transferred to another facility, and took no action.
5 Ms. Collins' appeals to him for help went unheeded and he did
6 nothing himself to investigate or do anything about the
7 report other than turn it over.

8 Now, Ms. Collins testified that Superintendent
9 Burge acknowledged to her after his deposition, that she
10 spoke to him and that he said that Auburn was a difficult
11 place to work for females, that it always had been that way
12 and always would be that way for females. Words to that
13 effect. Superintendent Burge, if you notice, did not rebut
14 that statement. He didn't contradict it. Now the state
15 defendants did not offer any other evidence about this
16 conversation, so what is the inference you can take from this
17 statement? You can understand that statement to mean that
18 even the superintendent of Auburn at the time knew that
19 Auburn was a workplace that was unwelcoming to females and
20 there was a tacit acceptance of that fact.

21 Now after Ms. Collins wrote this memo to
22 Superintendent Burge and didn't hear from anyone in
23 authority, she did turn to Superintendent Graham. Now
24 instead of being sympathetic and interested in what
25 Ms. Collins was telling the superintendent, instead, you've

1 heard testimony about what took place in that conversation.
2 He was -- he told her that he did not see any problems for
3 females in his time at Auburn, that she could sue in federal
4 court, that he had been in corrections for a very long time
5 and that, essentially that there were 15 female officers at
6 Auburn and she shouldn't expect any of them to back her up
7 because they needed their jobs. Now she told him that since
8 no one seemed to care, she was gonna do a letter writing
9 campaign and what did he do but he admonished her to watch
10 the restrictions in the employee handbook. He told her she
11 could sue in federal court. He also told her that she should
12 put her complaints in writing. Ms. Collins obviously did not
13 feel she was getting anywhere in that conversation and would
14 have to put her complaints in writing.

15 So what happened? The next day, she had
16 several encounters with Sergeant Mitchell, and he happened to
17 be her direct supervisor that day. Now although Ms. Collins
18 also contends that as a sergeant, he was her superior officer
19 and had supervisory authority and status over her generally,
20 you have to follow an order of a superior officer.

21 Now in her encounter with Sergeant Mitchell,
22 he made several obscene and graphic statements to her in
23 order to deliberately upset and embarrass her in front of the
24 other officers and inmates. The statements were, you've
25 heard them, he talks about got to take a shit, he talks about

1 how he farted at the table in front of his children, his
2 children's friends and walked naked in front of his children.
3 Why would you say that to somebody? Are you saying it to
4 disparage yourself? We believe that you can infer that that
5 was said to Ms. Collins in order to humiliate her, in order
6 to abuse her, not himself. Now he also told Ms. Collins that
7 his mother had nice tits, using that word in the backyard,
8 and another officer -- after another officer commented on her
9 ring, what does Sergeant Mitchell do? He said that his wife
10 had one like that but she lost it up -- it slipped off her
11 finger, she lost it up his ass. Now is that about himself or
12 is that done to humiliate and degrade her in front of other
13 officers? We believe that you can make that inference, and
14 that the evidence is there before you.

15 Now Ms. Collins testified during these
16 incidents that inmates were present, they could hear these
17 statements, they were within hearing distance, and at least
18 one inmate spoke to her later and asked her why officers
19 treated her like that. Now the fact that inmates could hear
20 this, and remembered these statements and this type of
21 conduct directed at Ms. Collins made this environment all the
22 more stressful for her.

23 Now later that day, this is all the same day,
24 so you have to -- we're asking you to look at this day as a
25 whole here, later that day, Ms. Collins' glasses were taped,

1 in what defendants claim was some sort of prank or nonsexual
2 act. But we're urging you to look at this incident in light
3 of the previous incidents. Sergeant Mitchell claims he did
4 not tape her glasses and Ms. Collins admits she did not see
5 him do it. Now if she wanted, she could have said he did it,
6 if she wanted to make it up, but she didn't, she said she
7 didn't see him do it because she didn't see him do it. But
8 what did he do when she complained about it? Excuse me,
9 sorry. He did nothing other than to slam a bottle of cleaner
10 on the table.

11 Now Ms. Collins was very upset, because by
12 this point, this day had been a pretty bad day. She asked to
13 be relieved, she was distraught, and Sergeant Mitchell
14 refused to do that. She said she couldn't do her duties
15 without her glasses but yet he refused to relieve her. She
16 went to the bathroom briefly, came back, glasses were
17 somewhat clean but yet they were broken. So she had to work
18 the rest of the day with bent, broken glasses which further
19 reminded her and those around her of what had happened. Now
20 these incidents were becoming extremely upsetting and
21 stressful to Ms. Collins. The stress increased that day when
22 she received hangup calls, that's all in the same day.

23 Now she wrote a memo to Sergeant Mitchell that
24 evening which you will read in your deliberations. She gave
25 a copy to Lieutenant Vasquez. Superintendent Graham

1 testified that he was called at home by a Captain Rourke who
2 read him that memo. He was notified immediately. Very
3 interesting. So what did Superintendent Graham do? He
4 turned it over to the office of diversity management. He
5 never spoke to Ms. Collins about the memo. We would ask you
6 to infer it's because he didn't want to be involved in a
7 lawsuit. He had a duty to do something about this type of
8 conduct to protect Ms. Collins but yet failed because he was
9 afraid of being involved in a lawsuit.

10 Now you can -- Superintendent Graham, rather,
11 testified that what he did is he spoke to Sergeant Mitchell
12 in the sergeant's room. What took place in that room was
13 private between them. But he never went to Ms. Collins and
14 asked her anything about this. Never followed up, never did
15 anything. He took the paper and faxed it someplace.

16 Now, after Ms. Collins took off for a weekend
17 after these incidents, she returned to work to find her time
18 card was missing again. Now we would urge that you draw an
19 inference that this is part of the pattern of conduct
20 directed at Ms. Collins on the basis of her gender. She was
21 subjected to cat calls from officers, and at the time clock
22 in front of other officers and when she went to the bathroom
23 she saw some new graffiti.

24 Now there's a lot of testimony about graffiti,
25 I'll talk about that a little bit more, but the graffiti that

1 she saw was directed at her. And it was, "Penny gives shitty
2 head. Shitty head's better than no head," and, "I wouldn't
3 let that bitch touch me." And you heard from the deposition
4 of Susan Carter that that graffiti was there. Now this was
5 on November 25th. Ms. Collins testified she tried to clean
6 it off but needed paint and it wouldn't come off. She
7 reported it to a lieutenant, but the evidence established
8 that it was not removed until sometime in February 2006.

9 If you put this timeline together, this was
10 after Mary Mayville began an investigation, she's from the
11 office of diversity management as you know, and she talked to
12 the superintendent about it. We submit that this is not
13 effective remedial action to take, to remove this graffiti
14 and change the environment that Ms. Collins worked in. This
15 should not take three months. It should be done immediately,
16 because that bathroom is open to officers, both male and
17 female, and it's also open to inmates who clean the bathroom.
18 And to wait three months till somebody from the office of
19 diversity management goes and talks to the superintendent is
20 unreasonable. There should have been something done
21 immediately. Ms. Collins talked to lieutenant, he said he
22 would take care of it, according to her testimony. And it
23 took three months for that to be done. We urge you to find
24 that that is not prompt and effective remedial action on the
25 part of the employer.

1 Now this graffiti's not the only time that
2 this type of graffiti appeared in the bathroom. Ms. Collins
3 and Susan Carter, who testified by deposition because she's
4 passed away, stated that the type of graffiti is common in
5 the bathroom for women at Auburn. Ms. Collins testified
6 about the drawings of females, sexual statements written, and
7 again, this is a bathroom that is -- inmates have access to.
8 Now whether or not there may be other graffiti in this
9 bathroom is not the point. The point is that the graffiti
10 that was about Ms. Collins and other females created a
11 hostile environment for women, not that there was maybe
12 something about a superintendent someplace, or something
13 about a male someplace. That is not the point. The point is
14 that, is the environment hostile for women, and we would urge
15 that you find that this graffiti added to the hostile
16 environment.

17 Now on the same day she discovered the
18 graffiti, Ms. Collins testified another corrections officer
19 told her get out of here when she's in the arch gate post and
20 he told her she had brought this on herself. This again was
21 in front of inmates and it was humiliating to Ms. Collins.
22 This officer refused to sit in the booth and Ms. Collins, you
23 recall her testimony, she stood outside in the cold.

24 This type of humiliation in front of inmates
25 was adding up for Ms. Collins and after a funeral trip that

1 she took in the beginning of December 2005, rumor spread in
2 the facility that she was dressed like a hooker, and that she
3 had complained about the correction officer that she went on
4 the funeral trip with, she had filed a sexual harassment
5 complaint or complained that he had sexually harassed her
6 which was untrue. That never happened.

7 All of this proved too much for Ms. Collins.
8 She continuously felt unsafe at work and did not have the
9 cooperation from her fellow officers. She felt that it was a
10 security issue with the inmates. She felt very unsafe in
11 that environment and we've seen in the video what that
12 environment is like in many respects.

13 The video I thought was very interesting and
14 I'll talk a little more about it but keep that video in mind
15 of how that video shows how you need your fellow officers,
16 you need to be on a team with them, you need them to be --
17 stand by you and know, and have the confidence that they're
18 going to do that. And that was not Penny Collins'
19 experience.

20 Now after being told that there was a rumor
21 that she was dressed like a hooker, Penny Collins felt that
22 she had a panic -- she was feeling like she had a panic
23 attack at work. This was beginning of December, 2005.
24 Essentially she ended up having a breakdown, she couldn't
25 control her crying, and went from there to her doctor's

1 office.

2 Now, you're going to have the opportunity in
3 the jury room to read the complaints that she wrote to Mary
4 Mayville and the office of diversity management. These are
5 quite lengthy and detailed statements and we ask that you
6 read these very carefully. The first one of the complaints
7 that she wrote to Mary Mayville is before Ms. Collins left
8 work but Ms. Mayville didn't have time to finish it that day,
9 so therefore, the evidence Ms. Collins presented and Mary
10 Mayville confirmed, that they went to Applebee's at a
11 subsequent time to finish it.

12 But the first part of the statement she
13 describes her treatment at Sullivan because she's giving the
14 office of diversity management again another chance to see
15 what she has been facing while working at the Department of
16 Corrections. And then she was out on medical leave, and then
17 you heard the policy about the office of diversity management
18 puts its investigations on hold while someone is out on
19 medical leave. Mary Mayville has testified she thought it
20 was a good idea. Well, she's from the office of diversity
21 management. Excuse me again. We would urge you to look at
22 this in a different light. How is it reasonable when
23 somebody goes out on stress or has some sort of problem as a
24 result of harassment to stop investigating it? You would
25 think there would be all the more effort to investigate it

1 and resolve it before this person came back to work. But the
2 opposite was true with the office of diversity management
3 policy.

4 Now the testimony of Ms. Collins was that she
5 repeatedly tried to get the office of diversity management to
6 continue their investigation, she even went to the union,
7 asked the union what to do about this and when it did not
8 seem like it was going to happen, Ms. Collins filed a
9 complaint with an independent agency, the New York State
10 Division of Human Rights. And it was only after that
11 complaint was filed, and the employer notified, that the
12 office of diversity management investigation was continued.

13 Ms. Collins contends that this policy places
14 an unnecessary delay in the employer taking prompt remedial
15 action.

16 Now after leaving Auburn on that December 7th,
17 2005 date, Ms. Collins never returned to work at Auburn. She
18 went on extended medical leave which her doctor originally
19 diagnosed as adjustment disorder with depressed mood. She
20 had symptoms of panic attacks, sleeplessness, crying,
21 depression, nausea, anxiety, fear of other people, fear of
22 police, because they wore a uniform. According to her
23 doctor, Dr. Alley, you heard that she had a breakdown and
24 serious psychological problems due to the way she was treated
25 by corrections officers at the New York State Department of

1 Corrections.

2 Now Ms. Collins attempted to save her career
3 in corrections eventually and requested a transfer to
4 Eastern. It is undisputed that she did fine there at Eastern
5 until Sergeant Mitchell arrived there. And after he arrived,
6 she again had a psychological breakdown and had to leave her
7 job there and went on an extended leave.

8 You've heard a lot of medical testimony about
9 Ms. Collins and her psychological problems. Now her doctor
10 testified that it originally was adjustment disorder with
11 depressed mood. Then he added anxiety and eventually changed
12 that diagnosis to PTSD, post-traumatic stress disorder. He
13 testified about how he arrived at that diagnosis.

14 Now Dr. First, the defense expert who was paid
15 almost \$15,000 to come here, testified that it did not, he
16 did not believe that it met the criteria, her disorder met
17 the criteria of PTSD but he did admit that she had many
18 symptoms, many symptoms, he did not dispute the symptoms, he
19 admitted that she had many symptoms that made her unable to
20 work at least temporarily. Dr. First also admitted that he
21 did not examine any medical records of Ms. Collins after
22 2007. He was unaware that she even tried to return to work
23 in 2008 but could not work in corrections according to her
24 doctor, Dr. Alley.

25 Now the defense will try to get you to believe

1 that Ms. Collins was somehow a fragile person, unsuited to
2 work in the Department of Corrections when the evidence
3 establishes otherwise. She held jobs throughout her life,
4 she testified about that, she was transferred, moved from job
5 to job, she never had an issue that she testified about any
6 kind of work with one exception, this being in the military.
7 This happened 33 years ago when she was quite young, late
8 teenager.

9 Ms. Collins has admitted several mistakes she
10 made during this trial. I think that you will note these
11 mistakes. One, she was 17 when this military, or 18, rather,
12 when this military experience took place. She doesn't shy
13 away from mistakes. Throwing the shirt in the trash, she
14 doesn't shy away from the mistakes. She owns up to her
15 mistakes. She told them to you, for you to weigh and for you
16 to make a decision about what took place in this case.

17 Now whatever label you decide or don't decide
18 to call Ms. Collins' disabilities, the evidence is clear that
19 she is disabled from working in corrections. She tried
20 repeatedly to return, she wanted to save her career, but each
21 attempt was unsuccessful. She did not exhibit or display
22 this set of symptoms, it's undisputed, prior to
23 December 2005. Dr. First could present no evidence of that
24 and did not. Dr. Alley testified that these symptoms did not
25 occur until December 2005.

1 Now you can decide that the cause of
2 Ms. Collins' problems was her harassment at the Department of
3 Corrections because she was female.

4 Now, there's other things that you're going to
5 be asked to decide. You can look at this harassment and
6 decide whether it was welcome or unwelcome. To that extent,
7 I ask you to compare Ms. Collins' testimony to what
8 apparently the defense thinks would establish some element of
9 welcomeness through the testimony of Robert Pabis if you
10 recall that witness who was very short, short period of time
11 on the stand. Mr. Pabis, Officer Pabis couldn't describe
12 what Ms. Collins looked like when he had these alleged
13 conversations with her, and Ms. Collins denied even knowing
14 or even meeting him, to her knowledge. That was the sole
15 extent of the evidence put on by the defendants as to this
16 harassment being welcome by Ms. Collins.

17 We believe that you will decide that the
18 harassment interfered with Ms. Collins' work performance
19 because it was very pervasive and severe at times, that this
20 created an atmosphere for Ms. Collins of intimidation and a
21 hostile or offensive working environment.

22 Now Ms. Collins has proved that supervisors
23 participated in this harassment. There were numerous
24 instance with defendant Mitchell participating, other ranking
25 officers participated, there's evidence in this record to --

1 for you to find that they are her supervisors, based on the
2 employer's own definition of supervisor and their authority
3 over her.

4 Now as far as coworkers participating in
5 harassment, the evidence shows that the employer knew or
6 should have known about the harassment because it's so
7 pervasive or Ms. Collins reported it to them. She has shown
8 that this was known by higher administration and that the
9 supervisors had the knowledge of the harassment and this
10 could be attributable to the employer.

11 Now while the employer did conduct some
12 investigations of the plaintiff's complaints, it did not
13 investigate all or take prompt remedial action. The
14 Department of Corrections administration ignored the
15 employer's own zero tolerance policy and passed the buck to
16 the office of diversity management. In the end, the office
17 of diversity management did too little and too late. There
18 was no employee disciplined as a result of any of the
19 complaints that Ms. Collins brought to their attention, or
20 discussed or reported with superintendents. There was a
21 failure to properly supervise the employees not engaging in
22 the harassment and a failure to even respond to some of her
23 complaints.

24 Now, there are individual claims against some
25 of these defendants in this case. First, again, defendant

1 Burge. We believe the evidence establishes that he had full
2 knowledge of what took place with Ms. Collins at Auburn when
3 he was there, and he failed to take action. All he did was
4 send a memorandum to the office of diversity management. He
5 failed to follow up with Ms. Collins, he failed to do
6 anything affirmative to end this, the harassment and abuse
7 she reported.

8 With respect to defendant Graham, again, he
9 had full knowledge, again, he sent it to the office of
10 diversity management but did not follow up, even with respect
11 to the memo that he knew about that related to defendant
12 Mitchell. He did not instruct -- there's evidence that he
13 followed the recommendation of the office of diversity
14 management, in fact that is to the contrary. You will see in
15 your deliberations that the memorandum from the office of
16 diversity management told him that the weapons training
17 officers should have additional sexual harassment training
18 and he did not do that. He solely issued a memorandum.

19 Now with respect to defendant Mitchell, the
20 evidence established that he participated in harassment and
21 actively contributed significantly to create a hostile work
22 environment for the plaintiff. We believe you can look at
23 this conduct of defendant Mitchell and find that there was
24 malice in this conduct, because it was designed to harm her.
25 It was a reckless disregard of the -- of the plaintiff's

1 constitutional rights to be free of harassment and be treated
2 equally on the job. We believe that the evidence thoroughly
3 supports that based on the nature of the conduct.

4 Now, Ms. Collins offered the testimony of
5 Dr. Reagles. You've seen charts and you have the whole
6 report. And this was offered to guide you in your damage
7 calculations should you award damages. We urge you to look
8 at the figures carefully. Some of these figures may be
9 disputed, they may not. We believe that Dr. Reagles' report
10 is fully supported by the documentation that he provides in
11 the report and you will have more than just these charts in
12 the jury room. You will have the whole report, you will have
13 the sources of the report, you will have the whole method of
14 thinking and calculations that Dr. Reagles carefully
15 explained to you. We urge you to use these figures to guide
16 you in awarding Ms. Collins back pay and front pay should you
17 award that, for her loss of career in corrections.

18 We are asking that you award an amount in
19 compensatory damages that compensates her for the harm that
20 was suffered, that would fairly and significantly compensate
21 her for this injury that she suffered at the hands or caused
22 by the defendants.

23 Ms. Collins has suffered greatly at her
24 employment at the Department of Correction and continues to
25 suffer today from these psychological problems. You heard

1 some argument from counsel that she's not seeking treatment,
2 but yet you have medical records about all the times she saw
3 Dr. Alley, all the times that she talked to him about her
4 problems, the medications that she took and I think that the
5 evidence is to the contrary that she did not seek treatment.
6 You have evidence in Dr. Alley's testimony about her going to
7 different counselors, and that we believe that the way that
8 the evidence is is to the contrary of what defense counsel
9 has presented.

10 Ms. Collins was a highly rated corrections
11 officer, as you can see by the evaluation reports. These
12 reports are undisputed. How the defendants can escape from
13 these reports, you can weigh that. Ms. Collins had a
14 promising career in the Department of Corrections until that
15 career was derailed. We ask you to look carefully at the
16 reports, look carefully at the documents, see for yourself
17 what her career would have been. You heard argument that she
18 didn't take the sergeant's exam in 2009. That's not the
19 point of Dr. Reagles' calculations here. The point is that
20 had she been there and eligible and able to take it, at some
21 point in that time period she would have become sergeant.
22 She would have taken the exam. She would have become
23 sergeant.

24 Now the defendants would like you to conclude
25 that the environment in the Department of Corrections through

1 the video -- I said I'd talk about the video a little bit --
2 was inherently inhospitable and it was -- and that
3 Ms. Collins did not fit into this environment, somehow
4 through some predisposed psychological condition, that
5 there's no evidence that she had. Now we believe the video
6 told you some other things as well, though. That the video
7 told you that good officers need compassion, they need
8 respect, and respect of their fellow officers, to be able to
9 handle inmates and make level-headed decisions. There's no
10 evidence offered by the defendants that Ms. Collins did not
11 have these qualities. In fact the evidence is to the
12 contrary through her evaluations, and her performance
13 evaluations.

14 The defendants basically are asking you to
15 look at the environment in the Department of Corrections
16 through the video, through some of the testimony that they've
17 offered, through some of the defendants, and decide that
18 basically there's two sets of laws. There's one set of laws
19 for everybody else and there's another set of laws for the
20 Department of Corrections. We submit to you that there's one
21 set of laws for women at work, there is one standard, and
22 women have the right and Ms. Collins has the right to be free
23 of sexual harassment, intimidation, and ridicule on the basis
24 of her gender. There's one set of laws for everybody, the
25 Department of Corrections is no different, and has no

1 different obligation and duty than any other employer.

2 Thank you very much for your patience, your
3 dedication, your service in the jury duty. I thank you for
4 paying attention to all of the evidence, listening to the
5 plaintiff's story. Weighing the evidence, the work that you
6 have before you, it's a lot of work, and we appreciate your
7 attention and devotion to it, and thank you very much for
8 your service. Thank you, your Honor.

9 THE COURT: All right. Ladies and gentlemen,
10 that concludes the closing statements. I'm going to let you
11 run in, have a bathroom break, I'm going to give you the
12 charge on the law, it's going to take a little bit. I'm
13 going to read it to you but I will send in copies of my
14 charge with you so you'll have it because it is lengthy, but
15 let's take a short break. Your lunch is coming about 12:30
16 but I'd like to try and get this charge done and then let you
17 eat lunch and, you know, start your deliberations, okay. So
18 go ahead and take a short break.

19 (Jury Excused, 12:13 p.m.)

20 THE CLERK: Court's in recess.

21 (Whereupon a recess was taken from 12:13 p.m.
22 to 12:21 p.m.)

23 (Open Court, Jury Out.)

24 THE COURT: Okay. My courtroom deputy is
25 handing you the final copy of the charge and verdict form

1 which represents your requests and objections. Some are
2 included, some are not but there's been significant changes
3 from what we had this morning, and that's the charge I'm
4 going to give to this jury. Okay. Rita, could you bring
5 them in, please.

6 (Jury Present, 12:22 p.m.)

7 THE COURT: Okay. The record should reflect
8 we have the ladies and gentlemen of the jury, plaintiff,
9 plaintiff's counsel, defendants, and defense counsel. First
10 bit of news if they haven't told you, we've put off your
11 lunch a little bit, so that I don't have to be a speed
12 reader. I was just telling Jodi I wanted to see how fast she
13 could go, but we'll -- it's been a long trial, we'll give her
14 a break.

15 I'm going to read you the jury instructions in
16 this case now. They're 32 pages long, okay. There is a
17 little table of contents in the beginning should you need to
18 find some part of the law quickly during your discussions and
19 deliberations in there, that will help you. And then we're
20 going to go right into -- you'll see how it's broken out once
21 you have it, we're going to go from there, okay.

22 Now that you've heard all the evidence and
23 arguments of counsel, it is my duty to instruct you on the
24 law applicable to this case.

25 Your duty as jurors is to determine the facts

1 of this case on the basis of the admitted evidence. Once you
2 have determined the facts, you must follow the law as I state
3 it and apply the law to the facts as you find them to be.
4 You are not to consider one instruction alone as stating the
5 law, but you are to consider the instructions as a whole.

6 You should not concern yourself with the
7 wisdom of any rule of law. You are bound to accept and apply
8 the law as I give it to you, whether or not you agree with
9 it. In deciding the facts of this case, you must not be
10 swayed by feelings of bias, prejudice, or sympathy towards
11 any party. The plaintiff and the defendants, as well as the
12 general public, expect you to carefully and impartially
13 consider the evidence in this case, follow the law as stated
14 by the court, and reach a decision regardless of the
15 consequences.

16 Nothing I say in these instructions is to be
17 taken as an indication that I have any opinion about the
18 facts of the case or what that opinion may be. It is not my
19 function to determine the facts; that is your function.

20 First of all, the role of the attorneys. The
21 function of lawyers is to call your attention to those facts
22 that are most helpful to their side of the case. What the
23 lawyers say, however, is not binding on you, and in the final
24 analysis, your own recollection and interpretation of the
25 evidence controls your decision. Not what's said by the

1 lawyers, but what you find the facts to be based on the
2 testimony that came from that witness stand.

3 Let me further elaborate on the role of
4 attorneys. Our courts operate under an adversary system in
5 which we hope that the truth will emerge through the
6 competing presentations of adverse parties. It is the role
7 of the attorneys to press as hard as they can for their
8 respective positions. In fulfilling that role, they have not
9 only the right but the obligation to make objections to the
10 introduction of evidence they feel is improper.

11 The application of the rules of evidence is
12 not always clear, and lawyers often disagree. It has been my
13 job as the judge to resolve these disputes. It is important
14 for you to realize, however, that my rulings on evidentiary
15 matters have nothing to do with the ultimate merits of the
16 case, and are not to be considered as points scored for one
17 side or the other.

18 Similarly, one cannot help becoming involved
19 with the personalities and styles of the attorneys. However,
20 it is important for you as jurors to recognize that it is not
21 a contest between attorneys. You are to decide this case
22 solely based on the evidence. Remember, statements and
23 characterizations of evidence by the attorneys are not
24 evidence. Insofar as you find their opening and/or closing
25 arguments helpful, take advantage of them, but keep in mind

1 that it is your memory and your evaluation of the evidence in
2 the case that counts.

3 In addition, you must not infer from anything
4 I've said during this trial that I hold any views for or
5 against either the plaintiff or the defendants. In any
6 event, my opinion, any opinion I might have is irrelevant to
7 your decision.

8 Having said that, at various times throughout
9 this trial, I have asked various witnesses certain questions.
10 To be clear, my questions are of no more consequence or
11 weight than are any of the questions asked by either attorney
12 throughout this trial. Rather, I have simply stated or asked
13 questions from time to time in an effort to clarify or
14 expound upon an issue raised by counsel.

15 Let's talk about evidence. As I stated
16 earlier, your duty is to determine the facts based on the
17 evidence I have admitted. The term evidence includes the
18 sworn testimony of witnesses and exhibits marked in the
19 record. Arguments and statements of lawyers, questions to
20 witnesses, and material excluded by my rulings are not
21 evidence. In addition, during the trial I sustained
22 objections to questions and either prevented a witness from
23 answering or ordered an answer stricken from the record. You
24 may not draw inferences from unanswered questions and you may
25 not consider any responses that I ordered stricken from the

1 record.

2 Direct and circumstantial evidence. While you
3 should consider only the admitted evidence, you may draw
4 inferences from the testimony and exhibits that are justified
5 in the light of common experience. The law recognizes two
6 types of evidence. Direct and circumstantial. Direct
7 evidence is the testimony of one who asserts personal
8 knowledge, such as an eyewitness. Circumstantial or indirect
9 evidence is proof of a chain of events that points to the
10 existence or nonexistence of certain facts.

11 The law does not distinguish between the
12 weight to be given to direct or circumstantial evidence, nor
13 is a greater degree of certainty required of circumstantial
14 evidence than of direct evidence. You may rely on either
15 type of evidence in reaching your decision. And I think you
16 all remember that first example I gave you that first day you
17 were here with regard to circumstantial evidence and direct
18 evidence.

19 Stipulated facts. The parties have also
20 presented some stipulated facts. A stipulated fact is simply
21 one that all the parties agree is true. You must accept any
22 such stipulated facts as true.

23 Evaluation of evidence. Credibility of
24 witnesses. You have had the opportunity to observe all the
25 witnesses. It is now your job to decide how believable each

1 witness was in his or her testimony. You are the sole judges
2 of the credibility of each witness and of the importance of
3 his or her testimony.

4 In evaluating a witness' testimony, you should
5 use all the tests for truthfulness that you would use in
6 determining matters of importance to you in your everyday
7 life. You should consider any bias or hostility the witness
8 may have shown for or against any party as well as the
9 interest a witness may have in the outcome of the case. You
10 should consider the opportunity the witness had to see, hear,
11 and know the things about which he or she testified, the
12 accuracy of the witness' memory, his or her candor or lack of
13 candor, the reasonableness and probability of the witness'
14 testimony, and the testimony's consistency or lack of
15 consistency, and its corroboration or lack of corroboration
16 with other credible testimony.

17 In other words, you must try to do in
18 deciding -- what you must try to do in deciding credibility
19 is to size up a witness in light of his or her demeanor, the
20 explanations given, and all of the other evidence in the
21 case. Always remember that you should use your common sense,
22 your good judgment, and your own life experience.

23 Finally, you should keep in mind that the
24 existence or nonexistence of a fact is not determined by the
25 number of witnesses called. Your concern is not with the

1 quantity but the quality of the evidence.

2 Medical witnesses. We heard from some
3 doctors. During the trial you heard plaintiff's treating
4 physician Dr. Alley give testimony based in part upon
5 observations that he made while treating plaintiff, and his
6 general experience as a doctor.

7 You also heard the testimony of Dr. Michael
8 First, a psychiatrist who examined plaintiff.

9 In weighing the testimony of each physician,
10 you may consider their qualifications, their opinions reached
11 during the course of treating or examining the plaintiff, as
12 well as all of the other considerations that ordinarily apply
13 when you're deciding whether or not to believe a witness'
14 testimony. You may give the testimony of each of these
15 physicians whatever weight, if any, you find it deserves, in
16 light of all the evidence in the case. You should not,
17 however, accept the testimony of a doctor simply because he
18 is a doctor. Nor should you substitute it for your own
19 reason, judgment, and common sense. You may reject the
20 testimony of either or both physicians in whole or in part if
21 you conclude that the reasons given in support of an opinion
22 are unsound, or if you, for other reasons, do not believe
23 him. The determination of the facts in this case rests
24 solely with you. Okay. Simply put, any expert witness, you
25 don't just accept their testimony because they're called, a

1 so-called expert. You evaluate it and go through the same
2 process you would for any other witness and make up your own
3 mind if their opinion is sound or unsound, based on what you
4 heard.

5 Expert witnesses. You will recall that
6 certain witnesses testified concerning their qualifications
7 in their fields of employment and their opinions concerning
8 issues in this case. When a case involves a matter of
9 science or art or requires special knowledge or skill not
10 ordinarily possessed by the average person, an expert is
11 permitted to state his opinion for the information of the
12 court and jury. The opinions stated by the experts who
13 testified before you were based on particular facts, as the
14 experts obtained knowledge of them and testified to them
15 before you, or as the attorneys who questioned the experts
16 asked the expert to assume. You may reject an expert's
17 opinion if you find the facts to be different from those
18 which form the basis for their opinion. You may also reject
19 the opinion if, after careful consideration of all the
20 evidence in the case, expert and other, you disagree with the
21 opinion. In other words, you're not required to accept an
22 expert's opinion to the exclusion of the facts and
23 circumstances disclosed by other testimony. Such an opinion
24 is subject to the same rules concerning reliability as the
25 testimony of any other witness. It is given to assist you in

1 reaching a proper conclusion. It is entitled to such weight
2 as you find the expert's qualifications in the field warrant
3 and must be considered by you but is not controlling upon
4 your judgment. Okay. Again, just what I said, it's up to
5 you to decide. Don't accept something just because it came
6 from a so-called expert. You evaluate it, just like any
7 other witness.

8 Impeachment by prior inconsistent statement.
9 You have heard counsel argue that the witnesses made
10 statements on earlier occasions that counsel maintains are
11 inconsistent with those witnesses' trial testimony. Evidence
12 of prior inconsistent statements is not to be considered by
13 you as affirmative evidence. However, any evidence of prior
14 inconsistent statement may be considered by you for the
15 limited purpose of helping you decide whether to believe the
16 trial testimony of the witness who you find to have
17 contradicted himself or herself. If you find that the
18 witness made an earlier statement that conflicts with his or
19 her trial testimony, you may consider that fact in deciding
20 how much of his or her trial testimony, if any, to believe.

21 In making this determination, you may consider
22 the following: Whether the witness purposely made a false
23 statement, or whether it was an innocent mistake; whether the
24 inconsistency concerns an important fact or whether it had to
25 do with a minor detail; whether the witness had an

1 explanation for the inconsistency, and whether that
2 explanation appealed to your common sense.

3 It is exclusively your duty, based on all the
4 evidence and your own good judgment, to determine whether the
5 prior statement was inconsistent, and if so, how much, if
6 any, weight should be given to the inconsistent statement in
7 determining whether to believe all or part of a witness'
8 testimony.

9 All available evidence need not be produced.
10 The law does not require any party to call as witnesses all
11 persons who may have been present at any time or place
12 involved in the case, or who may appear to have some
13 knowledge of the matters in issue at this trial, nor does the
14 law require any party to produce as exhibits all papers and
15 things mentioned in the evidence in this case.

16 Let's talk about the burden of proof. The
17 plaintiff has the burden of proving each and every element of
18 her claims by a preponderance of the evidence. If you find
19 that any one of the elements of plaintiff's claims has not
20 been proven by a preponderance of the evidence, you must
21 return a verdict for the defendant or defendants on that
22 claim.

23 The plaintiff must prove all elements of her
24 claims against each defendant.

25 The party with the burden of proof on any

1 given issue has the burden of proving every disputed element
2 of his or her claim or defense to you by a preponderance of
3 the evidence. If you conclude that the party bearing the
4 burden of proof has failed to establish his or her claim or
5 defense by preponderance of the evidence, you must decide
6 against him or her on the issue you are considering.

7 What does a preponderance of the evidence
8 mean?

9 To establish a fact by a preponderance of the
10 evidence means to prove that the fact is more likely true
11 than not true. A preponderance of the evidence means the
12 greater weight of the evidence. Again, it refers to the
13 quality and persuasiveness of the evidence, not to the number
14 of witnesses or documents. In determining whether a claim
15 has been proved by a preponderance of the evidence, you may
16 consider the relevant testimony of all witnesses, regardless
17 of who may have called them, and all the relevant exhibits
18 received in evidence, regardless of who may have produced
19 them.

20 If you find that the credible evidence on any
21 given issue is evenly divided between the parties, that is
22 equal -- it's equally probable that one side is right as it
23 is that the other side is right, then you must decide that
24 issue against the party having this burden of proof. That is
25 because the party bearing this burden must prove more than

1 simple equality. He or she must prove the element at issue
2 by a preponderance of the evidence. On the other hand, the
3 party with this burden of proof need prove no more than a
4 preponderance. So long as you find that the scales tip,
5 however slightly, in favor of the party with this burden of
6 proof, that what the party claims is more likely true than
7 not true, then that element will have been proved by a
8 preponderance.

9 Some of you may have heard of proof beyond a
10 reasonable doubt which is the proper standard of proof in a
11 criminal trial. That requirement does not apply to a civil
12 case such as this and should be put out of your mind.

13 Multiple defendants. Although there are
14 multiple defendants in this action, it does not follow from
15 that fact alone that if one is liable, the others are liable
16 as well. Each defendant is entitled to fair consideration of
17 his own defense and the defendant may not be prejudiced by
18 the fact, if it should become a fact, that you find against
19 another defendant. Unless otherwise stated, all instructions
20 given you govern the case as to each defendant, okay. That's
21 important. You have to consider each defendant separately.
22 There's no lumping of defendants here together. Okay.

23 The substantive law. The plaintiff Penny
24 Collins brought this action against her employer, the
25 New York Department of Correctional Services as well as the

1 following individuals: Harold Graham, superintendent of DOCS
2 facility at Auburn, New York; John Burge, former
3 superintendent of DOCS facility at Auburn, New York; and Troy
4 Mitchell, DOCS corrections officer. Generally, Ms. Collins
5 alleges that she has been the victim of a hostile work
6 environment based on sexual or gender-based harassment, a
7 form of employment discrimination.

8 More specifically, Ms. Collins has asserted
9 one claim against DOCS or Department of Correctional
10 Services, I'm going to refer to it as DOCS, which is that
11 DOCS violated Title VII of the Civil Rights Act, a federal
12 statute, and the New York Human Rights Law, statute by -- a
13 state statute, excuse me, by subjecting her to a hostile work
14 environment based on sexual or gender-based harassment.

15 Ms. Collins also asserts one claim against the
16 individual defendants, Harold Graham, John Burge, and Troy
17 Mitchell, which is that each of them deprived her of her
18 federally protected right to be free of a hostile work
19 environment based on sexual or gender-based harassment in her
20 public employment.

21 Let's talk about hostile work environment
22 under Title VII and New York Human Rights Law. In order for
23 a plaintiff to maintain a Title VII or a New York Human
24 Rights Law claim, a hostile work environment based on sexual
25 or gender-based harassment, the plaintiff must prove each of

1 the following elements by a preponderance of the evidence:
2 1, plaintiff was subjected to a sexually or gender-based
3 hostile work environment; and 2, defendant DOCS, plaintiff's
4 employer, is liable.

5 1, hostile work environment. A hostile work
6 environment is a workplace which is so permeated with
7 discriminatory intimidation, ridicule, and insult that is
8 sufficiently severe or pervasive to alter the condition of
9 the victim's employment and create an abusive working
10 environment and create such an environment because of the
11 plaintiff's sex.

12 Conduct which may create a hostile work
13 environment in the context of a sexual or gender-based
14 harassment claim includes, but is not limited to, unwelcome
15 sexual propositions, unwanted touching, sexual innuendo, the
16 display of sexually explicit materials or sexually derogatory
17 language.

18 Such conduct must be subjectively and
19 objectively unwelcome. Conduct is unwelcome if the plaintiff
20 did not solicit or invite the conduct and regarded the
21 conduct as undesirable or offensive.

22 To establish a hostile work environment, the
23 plaintiff must prove that she subjectively perceived the
24 environment to be abusive, offensive, and unwelcome. Second,
25 the conduct must be objectively abusive, offensive, and

1 unwelcome. In determining whether a hostile environment
2 objectively exists, you must consider the evidence from the
3 perspective of a reasonable person in the same circumstances
4 as the victim. That is, you must determine whether a
5 reasonable victim in the plaintiff's circumstances would have
6 been offended by the conduct in question. This is an
7 objective standard, and therefore you cannot view the
8 evidence from the perspective of an overly sensitive victim.
9 A plaintiff such as Ms. Collins must establish by a
10 preponderance of the evidence that the conduct was such that
11 a reasonable person would consider it to be so severe or
12 pervasive as to alter the conditions of her employment, thus
13 creating an abusive environment.

14 Furthermore, in deciding whether a work
15 environment is objectively hostile or abusive, you must
16 consider the totality of the circumstances. In general, in
17 order to be actionable, the incidents of harassment must
18 occur in concert with a regularity that can reasonably be
19 deemed pervasive. However, where the conduct is sufficiently
20 severe, such conduct may alter plaintiff's working conditions
21 without repetition. For example, a single instance of sexual
22 assault may be sufficient to alter the conditions of
23 employment and create an abusive working environment.

24 In considering the totality of the
25 circumstances, you may consider the following factors: 1,

1 the frequency of the conduct; 2, the severity of the conduct;
2 3, whether the conduct was verbal, physical, or both; 4,
3 whether the conduct was humiliating; 5, whether the conduct
4 was a mere offensive utterance; and 6, whether the conduct
5 unreasonably interfered with plaintiff's work performance.

6 If you find that the plaintiff has established
7 by a preponderance of the evidence that she was subjected to
8 a hostile work environment, the first element, then you must
9 consider the second element, i.e., whether a basis for
10 imputing employer liability exists.

11 In order for Ms. Collins to prevail -- this is
12 regarding employer liability. In order for Ms. Collins to
13 prevail on her hostile work environment claim, she must prove
14 by a preponderance of the evidence that a legal basis exists
15 for holding defendant DOCS liable for the conduct which
16 occurred. The standard for establishing employer liability
17 differs between a Title VII claim and a claim pursuant to
18 New York Human Rights Law.

19 Title VII. We'll start there. Title VII
20 employer liability standard. Under Title VII, there are two
21 different bases for imputing employer liability depending
22 upon whether the alleged harasser is the plaintiff's
23 supervisor or coworker.

24 In this case, plaintiff alleges that her
25 coworkers and one or more supervisors were the alleged

1 harassers.

2 A supervisor is one who has immediate or
3 successively higher authority over another worker. Examples
4 of such authority include the power to hire, fire, schedule
5 work hours, direct work assignments, evaluate work
6 performance, discipline, and grant pay raises.

7 If you decide that any of plaintiff's
8 harassers were supervisors, then you must apply the employer
9 liability based upon the acts of the supervisor. If you find
10 that any of plaintiff's harassers were coworkers, then you
11 must consider the employer liability on that basis.

12 Acts of a supervisor. An employer is presumed
13 to be absolutely liable for the sexual or gender-based
14 harassment committed by one of its supervisors.

15 However, the employer may raise an affirmative
16 defense, which the employer must prove by a preponderance of
17 the evidence to avoid such liability. The affirmative
18 defense consists of two elements: First, the employer
19 defendant, DOCS, exercised reasonable care to prevent the
20 harassment and once becoming aware of the harassment, DOCS
21 promptly took action to correct the harassing behavior;
22 second, plaintiff unreasonably failed to take advantage of
23 any complaint procedures offered by the employer defendant,
24 DOCS, or unreasonably failed to avoid harm otherwise.

25 As to the first element, an employer generally

1 meets its burden if it shows that it maintained a policy
2 against sexual or gender-based harassment and took
3 appropriate steps to address the complaint. The stated
4 policy should be suitable to the employment circumstances.

5 In considering the second element, you should
6 consider whether the plaintiff failed to fulfill her
7 corresponding obligation by showing she reasonably failed to
8 use any complaint procedure provided by the employer --
9 employer, excuse me. You may consider a plaintiff's excuse
10 in failing to use the employer's complaint procedure.
11 However, you should also keep in mind that it is not
12 reasonable for a plaintiff to fail to report alleged
13 harassment based only on her general fear of retaliation or
14 losing her job. A fear must be based on more than the
15 plaintiff's subjective belief. In such a case, evidence must
16 be produced to the effect that the employer has ignored or
17 resisted similar complaints or has taken adverse actions
18 against employees in response to such complaints.

19 If you determine that DOCS did not establish
20 the affirmative defense by a preponderance of the evidence,
21 you must find for the plaintiff. If you find that DOCS
22 proved the defense, you must find for DOCS.

23 Two. Acts of a coworker. If you find that
24 plaintiff was subjected to sexual or gender-based harassment
25 by one or more coworkers, then the employer defendant, DOCS,

1 is liable only if the plaintiff proves by a preponderance of
2 the evidence that a supervisor knew or should have known
3 about the harassment and failed to take steps reasonably
4 calculated to stop it.

5 To establish that the employer defendant,
6 DOCS, should have known about the harassment, the plaintiff
7 must prove that the hostile or abusive environment was so
8 pervasive and so open and obvious that any reasonable person
9 in supervisor's position would have known that the harassment
10 was occurring. In deciding whether employer liability exists
11 under this theory, you should consider all the evidence and
12 the circumstances including whether DOCS had an established
13 complaint procedure and whether the plaintiff took advantage
14 of that complaint procedure.

15 Employer liability under New York Human Rights
16 Law. As stated earlier, the standard for establishing
17 employer liability pursuant to New York Human Rights Law is
18 different than Title VII.

19 Under the New York Human Rights Law, an
20 employer is not responsible for the sexual or gender-based
21 harassment of one of its workers or supervisors unless the
22 employer became a party to the harassment by encouraging,
23 approving, or subsequently condoning it. Thus, the plaintiff
24 has the burden of showing that DOCS encouraged, approved of,
25 or subsequently condoned the harassment alleged by the

1 plaintiff.

2 To meet her burden of showing that DOCS
3 encouraged the harassment, the plaintiff must prove that DOCS
4 intentionally took some act to permit the harassment. To
5 prove that DOCS approved of or subsequently condoned
6 harassment, the plaintiff must establish DOCS knew about the
7 alleged harassment and allowed the harassment to continue.

8 In determining whether DOCS encouraged,
9 approved, or condoned the alleged harassment, you must
10 consider all the circumstances, including when DOCS learned
11 of the alleged harassment, and the extent to which the
12 plaintiff informed DOCS, or failed to inform DOCS of the
13 alleged conduct of certain of plaintiff's coworkers.

14 If you find that the plaintiff has proved that
15 DOCS encouraged, approved, or condoned the alleged
16 harassment, you must find in favor of plaintiff on the
17 New York Human Rights Law claim. If you determine that
18 plaintiff has not proved that DOCS encouraged, approved, or
19 condoned the alleged harassment, you must find in favor of
20 DOCS on the New York Human Rights Law claim.

21 Okay. We're going to move on to hostile work
22 environment under 42 U.S.C. Section 1983. 42 U.S.C. Section
23 1983, one of the laws to be applied in this case, is a
24 federal civil rights law that provides a remedy for
25 individuals who have been deprived of their federal statutory

1 or constitutional rights under color of state law. Section
2 1983 of Title 42 of the United States Code, the statute upon
3 which the plaintiff relies for her hostile work environment
4 claim based on sexual or gender-based harassment under the
5 Equal Protection Clause of the 14th Amendment to the United
6 States Constitution, states in pertinent part, as follows:

7 "Every person who, under color of any statute,
8 ordinance, [or] regulation ... of any State ..., subjects or
9 causes to be subjected, any citizen of the United States ...
10 to the deprivation of any rights, privileges, or immunities
11 secured by the Constitution and laws, shall be liable to the
12 party injured in an action at law"

13 I refer to this statute simply as Section
14 1983.

15 Section 1983 does not create any substantive
16 right in and of itself, but rather serves as the statutory
17 vehicle by which individuals can seek redress in this court
18 for alleged violations of federal statutory or constitutional
19 rights.

20 In this case, plaintiff alleges that Harold
21 Graham, John Burge, and Troy Mitchell, while acting under
22 color of state law, intentionally discriminated against
23 plaintiff based on her gender in violation of her rights
24 under the Equal Protection Clause of the 14th Amendment.

25 As I have said, Section 1983 does not create

1 any substantive right in and of itself, but rather, serves as
2 a statutory vehicle by which individuals can seek redress in
3 this court. As a result, it is necessary to discuss the
4 general requirements of a claim under Section 1983.

5 Generally, to establish a claim under Section
6 1983, the plaintiff must establish, by a preponderance of the
7 evidence, each of the following three things: 1, defendants
8 were acting under color of state law; 2, defendants' conduct
9 deprived the plaintiff of a federal right, that is, a right
10 secured by the Constitution or a federal statute; 3, the
11 defendants' conduct caused an injury to the plaintiff.

12 With regard to the first requirement, none of
13 the parties in this case disputes that defendants were
14 acting, during the relevant times, under color of state law.
15 Therefore, you need not concern yourself with this
16 requirement of plaintiff's claim.

17 With regard to the second and third
18 requirements, those requirements are embodied in the elements
19 of plaintiff's claim in this action, and I will now explain
20 them in greater detail.

21 The law requires that a defendant must have
22 been personally involved in the violation of a plaintiff's
23 constitutional rights before he may be held liable for that
24 violation. Therefore, you may not find a particular
25 defendant liable simply because of the supervisory position

1 that he held at the time these events occurred. Defendants
2 Harold Graham, John Burge, and Troy Mitchell each are what is
3 known as supervisory officials.

4 There are five ways in which a supervisory
5 official may be personally involved in a constitutional
6 deprivation within the meaning of 1983. First, the
7 supervisory official may have directly participated in the
8 violation. Second, the supervisory official may have failed
9 to remedy the violation after learning of it through a report
10 or appeal. Third, the supervisory official may have created
11 or allowed to continue a policy or custom under which the
12 violation occurred. Fourth, the supervisory official may
13 have been grossly negligent in managing subordinates who
14 caused the violation. Fifth, the supervisory official may
15 have exhibited deliberate indifference to the rights of the
16 plaintiff by failing to act on information indicating that
17 the violation was occurring.

18 Two. Hostile work environment. To establish
19 a hostile work environment claim under the Equal Protection
20 Clause, the plaintiff must demonstrate that, 1, she was
21 intentionally harassed; 2, the harassment was based on her
22 gender; 3, such actions were taken under the color of state
23 law; and 4, the harassment was so severe or pervasive as to
24 render the work environment hostile to her.

25 An act is done intentionally if it is done

1 knowingly, that is, it must have been done voluntarily and
2 deliberately, and not because of mistake, accident,
3 negligence, or innocent reason. In determining whether a
4 defendant acted knowingly or recklessly, you should remember
5 that, while witnesses may see and hear and be able to give
6 direct evidence of what a person does or fails to do, there
7 is no way of looking into a person's mind. Therefore, you
8 have to depend on what was done and what the people involved
9 said was in their minds and your belief or disbelief with
10 respect to those facts.

11 To determine whether the conduct was severe or
12 pervasive, the same standards apply as in the Title VII
13 hostile work environment claim and must be proved as to each
14 individual defendant.

15 Proximate cause. The plaintiff has the burden
16 of proving by a preponderance of the evidence that she
17 suffered an injury and that one or more of defendants' acts
18 and conduct were the proximate cause of her injury.

19 A proximate cause is one that in a natural
20 course, continuous sequence, unbroken by any intervening
21 cause, produces injury, and without which the injury would
22 not have occurred. Let me read that again. A proximate
23 cause is one that, in a natural course, a continuous
24 sequence, unbroken by any intervening cause, produces injury,
25 and without which, the injury would not have occurred.

1 Stated another way, before plaintiff may
2 recover damages for any injuries, she must first show by a
3 preponderance of the evidence that such injury would not have
4 come about were it not for one or more of the defendants'
5 conduct. To the extent that you find plaintiff has a
6 preexisting injury, plaintiff must prove by a preponderance
7 of the evidence that the alleged conduct by defendants caused
8 that preexisting injury to get worse. But even if she shows
9 that, she must then show by a preponderance of the evidence
10 that the injury in question, although caused by the conduct
11 of one or more of the defendants, was not also caused by some
12 other intervening conduct other than the defendants' conduct.

13 An intervening cause is one that constitutes a
14 new and independent source of plaintiff's injury. A new
15 factor of plaintiff's injury which is not foreseeable by the
16 defendants is an intervening cause which prevents defendants
17 from being liable for plaintiff's injury, even if defendants'
18 conduct was one of the causes of these injuries.

19 If you find that the plaintiff has sustained
20 her burden of proving all of these elements on either of her
21 Section 1983 claims, you must find for the plaintiff on the
22 claim, or those claims.

23 If you find that any one of the three elements
24 of the plaintiff's Section 1983 claim has not been proven by
25 a preponderance of the evidence, you must return a verdict

1 for the defendants on that claim.

2 Now we're going to talk about an affirmative
3 defense of qualified immunity. Even if you find that any of
4 the defendants violated plaintiff's constitutional or
5 statutory rights, that defendant still may not be liable to
6 plaintiff. This is because the defendant may be entitled to
7 what is called a qualified immunity. If you find that he is
8 entitled to such immunity, you may not find him liable to the
9 plaintiff.

10 Generally, a defendant will be entitled to
11 qualified immunity if, at the time he took the actions in
12 question, a reasonable person would not have known that those
13 actions violated the statutory or constitutional right. As a
14 result, a qualified immunity inquiry generally involves two
15 issues. Whether the facts established that the defendant's
16 conduct violated a statutory or constitutional right; and 2,
17 whether a reasonable corrections official in the defendant's
18 situation would have known that his or her conduct violated
19 that right.

20 If you answer the first issue in the negative,
21 that is, you find that the facts do not establish that
22 defendant's conduct violated a statutory or constitutional
23 right, there is no need to proceed to the second issue, you
24 have found that defendant is entitled to qualified immunity.

25 With regard to the second issue, in deciding

1 whether a reasonable corrections official in the defendant's
2 situation would have known that his conduct violated a
3 statutory or constitutional right, you may consider the
4 following: 1, the nature of the defendant's official duties;
5 2, the character of his official position; 3, the information
6 that was known or not known to him; 4, the events that
7 confronted him. In addition, you may also use your common
8 sense in reaching this decision. However, you should not
9 consider what the defendant's subjective state of mind was,
10 regardless of whether that defendant was acting in good
11 faith, or was unaware of the right, or was actually intending
12 to harm the plaintiff. Rather, as I have said, the issue
13 before you is whether a reasonable corrections official in
14 the situation of any of the defendants would have known that
15 his conduct violated a statutory or constitutional right.

16 Finally, the defendants have the burden of
17 proving this affirmative defense by a preponderance of the
18 evidence. If any or all of the defendants convince you by a
19 preponderance of the evidence that a reasonable corrections
20 official in their situation would not have known that his
21 conduct violated a statutory or constitutional right, then
22 you must return a verdict for that defendant, even though you
23 may have previously found that he in fact violated the
24 plaintiff's rights.

25 Okay. Damages. If the plaintiff has proven

1 by a preponderance of the evidence that one or more
2 defendants are liable on any of plaintiff's claims, you must
3 determine the damages to which the plaintiff is entitled.
4 However, you should not infer that the plaintiff is entitled
5 to recover damages merely because I am instructing you on the
6 elements of damages. It is exclusively your function to
7 decide upon liability, and I am instructing you on damages
8 only so that you will have guidance should you decide that
9 plaintiff is entitled to recovery. Okay. That's important.

10 Compensatory damages. The purpose of the law
11 of damages is to award, as far as possible, just and fair
12 compensation for loss, if any, that resulted from a defendant
13 or defendants' alleged violation of the plaintiff's statutory
14 or constitutional rights. If you find that one or more of
15 the defendants are liable on any of the plaintiff's claims,
16 as I have explained them, then you must award the plaintiff
17 sufficient damages to compensate her for any injury
18 proximately caused by defendant or defendants' conduct.

19 An injury is proximately caused by an act or
20 failure to act whenever it appears from the evidence that the
21 act or failure to act played a substantial part in bringing
22 about or actually causing the injury, and the injury was
23 either a direct result or reasonably probable consequence of
24 the act or omission.

25 The plaintiff has alleged that as a result of

1 defendants' hostile work environment, she suffered emotional,
2 mental, physical, and monetary losses. This is what we call
3 compensatory damages. The plaintiff has the burden of
4 proving any compensatory damages by a preponderance of the
5 evidence. If the plaintiff does not establish by a
6 preponderance of the evidence that she experienced emotional,
7 mental, or physical and/or monetary losses because of the
8 defendants' actions or inactions, then she cannot recover
9 compensatory damages.

10 If you determine that the plaintiff has proven
11 by a preponderance of the evidence that she has experienced
12 emotional, mental, physical, or monetary losses as a
13 proximate result of her work environment, you may award her
14 damages for those injuries. No evidence of the monetary
15 value of such intangible things as pain and suffering has
16 been or needs to be introduced into evidence. No exact
17 standards exist for fixing the compensation to be awarded for
18 these elements of damages. The damages that you award must
19 be fair compensation -- no more, no less. However, actual
20 damages must not be based on speculation or sympathy. They
21 must be based on evidence presented at trial, and only on
22 that evidence.

23 Damages of lost wages. I'm going to start
24 with back pay. Should you find that plaintiff was unable to
25 return to work as a corrections officer on account of any of

1 the defendants' discrimination against the plaintiff, you may
2 award any amount that reasonably compensates the plaintiff
3 for any lost wages and benefits, taking into consideration
4 any increases in salary and benefits, including pensions,
5 that the plaintiff would have received had she not been
6 discriminated against. You have the ability to make the
7 plaintiff whole for any wages or other benefits that she has
8 lost as result of her inability to be able to return to work
9 as a result of any defendants' wrongful conduct, should you
10 find.

11 Front pay. You may determine whether
12 plaintiff will be unable to return to work for some time in
13 the future at DOCS due to medical conditions that plaintiff
14 developed as a result of defendants' discrimination of
15 plaintiff. If you determine -- if you so determine, you may
16 award plaintiff front pay to compensate her for loss of
17 employment.

18 Front pay is future damages, monetary amount
19 equal to the present value of the wages and benefits that the
20 plaintiff would have earned had she not been discriminated
21 against for that period from the date of your verdict until
22 the date when the plaintiff would have voluntarily resigned
23 or retired from DOCS as an employee, from their employ.

24 Mitigation of damages. In determining the
25 amount of damages, if any, that plaintiff is entitled to

1 recover, the law provides that the plaintiff must take a
2 reasonable -- make a reasonable effort to minimize or reduce
3 her damages for loss of compensation by seeking employment.
4 This is called mitigation of damages. Generally, an employer
5 seeking to avoid a lost wages award bears the burden of
6 demonstrating that a plaintiff has failed to satisfy the duty
7 to mitigate. This may be done by establishing, 1, that
8 suitable work existed; 2, that the employee did not make
9 reasonable efforts to obtain it.

10 In determining whether plaintiff's failure to
11 seek out or take advantage of business or employment
12 opportunity was reasonable, you should be aware that the
13 plaintiff is only required to accept employment that is of a
14 like nature. In determining whether employment is of a like
15 nature, excuse me, you may consider, 1, the type of work; 2,
16 the hours worked; 3, the compensation; 4, the job security;
17 5, the working conditions; and 6, other conditions of
18 employment.

19 You may consider plaintiff's attempt to return
20 to work at DOCS as an attempt to mitigate her damages.

21 Generally, a plaintiff who opts to attend
22 school and abandons her job search during her period to
23 mitigate does not meet her duty to mitigate. However, one
24 who chooses to attend school only when diligent efforts to
25 find alternate work failed or continues her search for

1 employment while attending school does meet the duty to
2 mitigate.

3 If you determine that plaintiff is entitled to
4 back pay or front pay damages, you must reduce these damages
5 by the amount that the plaintiff actually earned following
6 her last day of active duty for DOCS or the amount you
7 determine that the plaintiff could have earned if she did not
8 make a reasonable effort to find alternate employment during
9 the period from her last day of active duty until the date of
10 trial.

11 C. Nominal damages. If you return a verdict
12 for plaintiff but find that plaintiff has failed to prove by
13 a preponderance of the evidence that she suffered any actual
14 damages, then you must return an award of damages in some
15 nominal or token amount not to exceed the sum of one dollar.

16 Nominal damages must be awarded when the
17 plaintiff has been deprived by the defendants of a federal or
18 statutory, federal statutory or constitutional right but has
19 suffered no actual damage as a natural consequence of that
20 deprivation. The mere fact that a statutory or
21 constitutional deprivation occurred is an injury to the
22 person entitled to enjoy that right, even when no actual
23 damages flow from that deprivation. Therefore, if you find
24 the plaintiff has suffered no injury as a result of a
25 defendant or defendants' conduct other than the fact of a

1 statutory or constitutional deprivation, you must award
2 nominal damages not to exceed one dollar.

3 Punitive damages. Plaintiff also seeks
4 punitive damages against defendant Mitchell. If you do not
5 award plaintiff nominal or compensatory damages on her
6 Section 1983 claim against defendant Mitchell, you may
7 consider whether the plaintiff is entitled to an award of
8 punitive damages against him.

9 Punitive damages are awarded in the discretion
10 of the jury to punish a defendant for extreme or outrageous
11 conduct or to deter or prevent a defendant and others like
12 him or her from committing similar acts in the future.

13 I must emphasize, however, that at this stage
14 of the proceedings, you are only to consider whether or not
15 the plaintiff is entitled to such an award of punitive
16 damages. If you determine that the plaintiff is entitled to
17 such an award, you will be asked to determine what amount
18 such award should be at a separate hearing concerning this
19 issue. Therefore, you are not to consider the amount of
20 punitive damages, if any, you believe the plaintiff is
21 entitled to receive.

22 You may conclude that the plaintiff is
23 entitled to punitive damages if you find that the plaintiff
24 has proven by a preponderance of the evidence that defendant
25 Mitchell engaged in discriminatory practice with malice or

1 with reckless indifference to plaintiff's federally protected
2 right to be free from sexual or gender-based harassment in
3 her public employment.

4 In order to establish malice or reckless
5 indifference, plaintiff need not show that the defendant
6 committed egregious or outrageous acts. Rather, a plaintiff
7 need only demonstrate the defendant had the requisite state
8 of mind of malice or reckless indifference. An act is
9 malicious if it was prompted by ill will or spite towards the
10 plaintiff. A defendant is malicious when he consciously
11 desires to violate federal rights of which he is aware, or
12 when he consciously desires to injure the plaintiff in a
13 manner he knows to be unlawful. An act is reckless -- is a
14 reckless disregard of plaintiff's rights if the defendant
15 acted callously or without regard for plaintiff's rights.

16 Again, please remember that at this stage of
17 the proceedings, you only consider whether or not the
18 plaintiff is entitled to such an award of punitive damages.

19 In conclusion -- no cheers -- I've outlined
20 the rules of law applicable to this case, and the process by
21 which you should weigh the evidence and determine the facts.
22 In a few minutes, you will retire to the jury room for your
23 deliberations. Your first order of business in the jury room
24 will be to select a foreperson. The foreperson's
25 responsibility is to ensure that deliberations proceed in an

1 orderly manner. This does not mean that the foreperson's
2 vote is entitled to any greater weight than the vote of any
3 other juror. Your job as jurors is to reach a fair
4 conclusion from the law and the evidence.

5 The verdict must represent the considered
6 judgment of each juror. In order to return a verdict, it is
7 necessary that each juror agree. Your verdict must be
8 unanimous.

9 When you are in the jury room, listen to each
10 other, excuse me, and discuss the evidence, and the issues.
11 It is the duty of each of you as jurors to consult with each
12 other. You must deliberate with a view to reaching an
13 agreement, only if you can do so without violating your
14 individual judgment and conscience. Do not surrender your
15 honest convictions just for the purpose of returning a
16 verdict. On the other hand, do not hesitate to reexamine
17 your views. Remember, you are not partisans. You are the
18 judges -- the judges of the facts. Your duty is to seek the
19 truth from the evidence presented.

20 If in the course of your deliberations, your
21 recollection of any part of the testimony should fail, or if
22 you should find yourself in doubt concerning my legal
23 instructions, it is your privilege to return to the courtroom
24 to have the testimony read to you or my instructions further
25 explained. I caution you, however, that the read-back of

1 testimony may take some time and effort. You should
2 therefore make conscientious efforts to resolve any questions
3 as to testimony through your collective recollection --
4 recollections.

5 Should you desire to communicate with the
6 court during your deliberations, please put your message or
7 question in writing. The foreperson should sign the note and
8 pass it to the marshal who will bring it to my attention. I
9 will then respond either in writing or orally by having you
10 returned to the courtroom. In any communications with the
11 court, you should never state your numerical division, should
12 there be one.

13 Once you have reached a unanimous verdict or
14 decision, your first -- your foreperson should fill in the
15 special verdict form, date it, sign it, and inform the
16 marshal that a verdict has been reached. A special verdict
17 form has been prepared for each of you. I will now review it
18 with you before you retire to your jury room.

19 Let me clarify, it doesn't matter who writes
20 the note, I suggest the person with the best handwriting.
21 The foreperson just has to sign it, date it, put the time
22 that it was -- it's being sent to the court's attention.
23 Okay.

24 Hopefully make you relax a little bit, a copy
25 of this will be sent in, one for each of you, makes it that

1 much easier, I've found in deliberations. If you do have
2 questions, though, you are free to send a note and ask me for
3 further clarification or explanation about any of the law
4 that I'm going to give to you, should you need that.

5 Now, I'm just going to run through the special
6 verdict form quickly. It should be pretty self-explanatory.
7 The first section says claims. You must answer question 1
8 and 2. If you find in favor of plaintiff on any of her
9 claims, then you must proceed to Section II entitled damages.
10 First of all, hostile work environment claim against DOCS
11 under Title VII, New York Human Rights Law. Did plaintiff
12 prove by preponderance of the evidence that she was subjected
13 to a hostile work environment? Yes or no. If your answer to
14 Question 1 is no, then you must render a verdict in favor of
15 DOCS on this question and proceed to Question 2. If your
16 answer to Question 1 is yes, then proceed to Question 1b.

17 1b is this. Did plaintiff prove by a
18 preponderance of the evidence that a legal basis exists under
19 Title VII for imputing the conduct that created the hostile
20 work environment to DOCS? Remember that part of my
21 instruction, explain that there's a defense for the employer
22 that is explained in the legal instructions, so that just
23 says yes or no. And regardless of how you answer this
24 question, proceed to Question 1c.

25 1c, did plaintiff prove by a preponderance of

1 the evidence that a legal basis exists under New York Human
2 Rights Law for imputing the conduct that created the hostile
3 work environment to DOCS, yes or no? After that, if your
4 answer to Question 1b and 1c are no, then you must render a
5 verdict in favor of DOCS on this claim. If your answer to
6 Question 1b is yes, then you have found in favor of plaintiff
7 on her Title VII hostile work environment claim. If your
8 answer to Question 1c is yes, then you have found in favor of
9 plaintiff on her New York Human Rights Law hostile work
10 environment claim.

11 Regardless of how you answered this question,
12 proceed to Question 2. Question 2, Section 1983 sexual
13 harassment claim against defendants Burge, Graham, and
14 Mitchell. Did plaintiff prove by a preponderance of the
15 evidence that one or more of the defendants, Burge, Graham,
16 or Mitchell, individually sexually harassed her? Okay, and I
17 emphasize individually again because it has to be
18 consideration of each defendant separately. Do not lump or
19 try and group anybody else's behavior in with anybody else's.
20 It's individually, Burge, Graham, Mitchell, just has a place
21 to say yes or no for each one.

22 If your answer to Question 2a is yes as to one
23 or more listed defendants, then proceed to Question 2b with
24 regard to that defendant or those defendants. If your answer
25 to Question 2a is no as to one or more listed defendants,

1 then you must render a verdict in favor of that defendant or
2 those defendants on this action.

3 2b, do you find that the defendant or
4 defendants for whom you answered yes to Question 2a is or are
5 entitled to qualified immunity on plaintiff's Section 1983
6 sexual harassment claim? And it's just yes or no as to each
7 individual defendant again, has to be determined individually
8 as to Burge, Graham, and Mitchell.

9 If your answer to Question 2b is yes, then you
10 must render a verdict in favor of that defendant or those
11 defendants on this claim. If your answer to Question 2b is
12 no, then you have found in favor of the plaintiff as to that
13 defendant or those defendants on plaintiff's Section 1983
14 sexual harassment claim.

15 Then, there's a section on damages should you
16 find that that's appropriate, then you would go to this
17 section based on your earlier decisions. If you go to this
18 section, it says damages, answer the following questions only
19 if you found in favor of plaintiff on one or more of her
20 claims. 3, did you prove -- did plaintiff prove by a
21 preponderance of the evidence that she sustained an injury?
22 Yes or no. If your answer to Question 3 is no, then you must
23 skip the next question and proceed to Question 5. If your
24 answer to Question 3 is yes, then proceed to Question 4.

25 Here's Question 4. Did plaintiff prove by a

1 preponderance of the evidence that the act or omission
2 alleged in the claim or claims for which you found in favor
3 of plaintiff was the proximate cause of injury or injuries,
4 and/or emotional distress that she suffered? Was it the
5 proximate cause? Yes or no. If your answer to Question 4 is
6 no, then you must proceed to Question 5, and award plaintiff
7 nominal damages in an amount not to exceed one dollar. If
8 your answer to Question 4 is yes, then you must proceed to
9 Question 5 and award plaintiff compensatory damages not to
10 include back pay and/or front pay. If you answered no to
11 Question 3 or 4, but you found in favor of plaintiff under
12 Title VII against DOCS or you found in favor of plaintiff
13 under Section 1983 claim against defendants Burge, Graham,
14 and/or Mitchell, you must enter the nominal damage amount of
15 one dollar. If you answer yes to Question 3 and 4, state the
16 amount of damages to which plaintiff is entitled to recover
17 in compensation for her injuries, not to include back pay or
18 front pay, and then there's a line. If you find that
19 plaintiff is entitled to back pay and/or front pay for lost
20 wages, state the amount. And there's two lines, back pay
21 line, front pay line.

22 7. If you found in favor of plaintiff on her
23 Section 1983 claim against defendant Mitchell, did plaintiff
24 also prove by a preponderance of the evidence that defendant
25 Mitchell violated her constitutional right to be free from

1 sexual harassment in her public employment with malice or
2 reckless indifference to that right? Yes or no. And then it
3 just has a place where it says foreperson please date and
4 sign the special verdict form below and notify the marshal
5 that you have reached a verdict. Has a date and a place to
6 be signed, by the foreperson. Okay.

7 That concludes my instructions, including the
8 special verdict form. Does anyone have any questions before
9 I ask you to retire to have your lunch and then start
10 deliberations after your lunch? Okay. There being no sign
11 of any questions, I'm going to ask you to swear in the
12 marshals, please, for this jury.

13 THE CLERK: Can you state your full names for
14 the record.

15 COURT SECURITY OFFICER: Rita Boskovski.

16 COURT SECURITY OFFICER: Bruce Patrick Wahl.

17 (Whereupon the court security officers were
18 duly sworn.)

19 THE CLERK: Thank you.

20 THE COURT: Okay. You may retire, have your
21 lunch, and then start deliberations.

22 (Jury Excused for Deliberations, 1:23 p.m.)

23 THE COURT: Okay. The jury has retired to
24 deliberate. Ms. Connor, do you have any requests or
25 objections with regard to the charge? Other than what you

1 previously put on the record? No reason to go through
2 everything.

3 MS. CONNOR: Then no, your Honor. What we
4 discussed in the library were my objections.

5 THE COURT: Okay, there were several changes
6 made.

7 MS. CONNOR: I noted that, your Honor.

8 THE COURT: Okay. And is there anything in
9 particular beyond what you've previously indicated based on
10 the final copy that you were able to review where you have
11 any requests or objections?

12 MS. CONNOR: Not beyond what was -- what was
13 already raised in the library.

14 THE COURT: Okay, I don't think there's any
15 reason to go back through that then.

16 MS. CONNOR: No, sir.

17 THE COURT: For the state defendants?

18 MS. SHEEHAN: No objections, your Honor.

19 THE COURT: Mr. Andrews, on behalf of
20 defendant Mitchell?

21 MR. ANDREWS: On behalf of defendant Mitchell,
22 nothing beyond what was discussed in the library and I think
23 that was mostly addressed.

24 THE COURT: I think they were mostly addressed
25 except for your last objection to the punitive damages

1 charge. I think everything else you asked or requested was
2 included in some form or another, based on our research. So
3 okay. And your objections were noted on the record.

4 Okay. I'm going to ask you before you take
5 off anywhere that you leave a number, either a cell number or
6 place where you're going to be if you leave the courtroom or
7 the courthouse, so that we can get you quickly should there
8 be a note. If you're going to be around the courtroom,
9 that's fine, but if you're going to stray, which I'm assuming
10 you're going to go have lunch or anything else, please leave
11 a number so we can reach you and get you back here should we
12 need you. Okay. Anything else?

13 MS. SHEEHAN: No, your Honor.

14 MS. CONNOR: No, thank you.

15 THE COURT: Enjoy your lunch.

16 The court will note a typo in the jury
17 instruction that I corrected in my reading. It's on page 28,
18 the very top, when listing, in determining whether employment
19 is of a like nature you may consider, gives a list, started
20 with the type of work, 2, the hours of work, 3, compensation,
21 goes down, there are two number 5s listed there, the court
22 read the second one as number 6. There's a typo there and
23 that should be noted for the record, and I don't know that it
24 has a material effect on anything other than a typo of two 5s
25 instead of a 6, but it's noted.

1 (Court in recess for jury deliberations,
2 1:25 p.m. to 3:10 p.m.)
3 (Open Court, Jury Out.)

4 THE COURT: Okay. We're in the courtroom
5 without the jury, we received a note from the jury, it's been
6 marked as Court Exhibit Number 1, it's my understanding that
7 counsel has been provided copy of this note. I'm going to
8 read it into the record. It says, "Your Honor, is there a
9 final report and conclusion submitted from Mary Mayville
10 and/or Jami Kaplan regarding complaints made by Penny
11 Collins? If so, please provide exhibit numbers."

12 Okay. The short answer is no, there were no
13 reports. You may recall that I believe plaintiff's counsel
14 was going to offer them but I made a ruling both pretrial and
15 during the trial that any such reports would invade the
16 province of the jury because they had conclusions and
17 findings that I felt would be inappropriate for this jury to
18 consider.

19 So it's the court's intention to bring the
20 ladies and gentlemen in, just briefly, and put on the record,
21 or put on the record, tell them that there are no such
22 exhibits for them to consider. And that will be the end of
23 it. Ms. Connor, anything?

24 MS. CONNOR: No, your Honor.

25 MS. SHEEHAN: No, your Honor.

1 MR. ANDREWS: Nothing, your Honor.

2 THE COURT: Okay. So that's what we'll do
3 then. Bring them in, please.

4 COURT SECURITY OFFICER: It will be just a
5 second, Judge.

6 MS. CONNOR: Your Honor -- never mind.

7 (Jury Present, 3:12 p.m.)

8 THE COURT: Okay. The record should reflect
9 we have the ladies and gentlemen of the jury, plaintiff,
10 plaintiff's counsel, defendants, and defense counsel.
11 Received a note from the jury and the note reads, it's Court
12 Exhibit Number 1, as it's been marked, it says, "Your Honor,
13 is there a final report and conclusion submitted from Mary
14 Mayville and/or Jami Kaplan regarding complaints made by
15 Penny Collins? If so, please provide exhibit numbers." The
16 short and sweet and quick answer is no, there are no such
17 exhibits that have been offered into evidence. Okay. And
18 that will end the court's response unless you have some other
19 question regarding that, but if you do, I'm going to ask you
20 to submit it in writing so that we have it on the record,
21 okay. Was lunch okay?

22 A JUROR: Yes.

23 THE COURT: Everybody had a good lunch? Okay.
24 I'm going to let you retire then and continue your
25 deliberations.

1 (Jury Excused, 3:14 p.m.)

2 THE COURT: Okay. Anything else?

3 MS. CONNOR: No, your Honor.

4 THE COURT: Okay.

5 THE CLERK: Court's in recess.

6 THE COURT: We'll remain in recess.

7 (Court in recess for jury deliberations,
8 3:14 p.m. to 5:13 p.m.)

9 (Open Court, Jury Out.)

10 THE COURT: Okay. The record should reflect
11 we're in the courtroom without the jury with plaintiff,
12 plaintiff's counsel, defendants, and defense counsel. I just
13 wanted to touch base with you, my thoughts as far as how we
14 would proceed. It's now 5:13, and it's my intention that if
15 I don't receive something from them within the next 10 to 15
16 minutes, I'm going to ask that they be brought in, I'm going
17 to ask them, you know, because of the hour of the day,
18 whether they're close to a verdict or not. If they're not
19 close, then I'm going to send them home, have them come back
20 tomorrow morning at 9:00. I don't want to have people stay
21 here all hours of the night and day, we're a kinder, gentler
22 court than we used to be when we would stay here till
23 midnight or 1:00 in the morning, as I recall back in the day
24 waiting for verdicts. We're not going to do that. I think
25 it's more appropriate and they think better if they go home

1 and get some rest and come back.

2 So that's what I intend to do and I'm open to
3 any requests or comments with regard to that. Ms. Connor,
4 you go first, do you have any?

5 MS. CONNOR: No, your Honor, that's a fine way
6 to proceed for us. That's great.

7 THE COURT: Okay.

8 MS. SHEEHAN: Sounds fine with us.

9 THE COURT: Mr. Andrews?

10 MR. ANDREWS: Same here, your Honor.

11 THE COURT: Okay. Well, that's what I'm going
12 to do. If I don't have something from them within the next
13 10 minutes which will put us almost at 5:25, I'm going to
14 bring them -- not going to pressure them, just ask them,
15 look, I don't want to interrupt your deliberations but if
16 you're not close to a verdict, given the hour of the day, it
17 would be my intention to send you home and bring you back to
18 restart your deliberations at 9:00 in the morning. I'll
19 instruct them that they're not to discuss it with anybody or
20 deliberate or do anything until they're back, until all seven
21 jurors are back in the jury room tomorrow morning and
22 that's -- that would be it. Okay. All right. So stand by.

23 I'm going to head back into chambers, we'll
24 give them 10 more minutes. If there isn't anything, that's
25 what we'll do, okay.

1 THE CLERK: Court's in recess.

2 (Court in recess, 5:15 p.m. to 5:25 p.m.)

3 (Open Court, Jury Out.)

4 THE COURT: We're in the courtroom without the
5 jury, it's 5:25. As I indicated, I'm going to have the jury
6 brought in and just do a reading as to where they are. Okay.
7 Bring them in, please.

8 (Jury Present, 5:25 p.m.)

9 THE COURT: Okay. The record should reflect
10 we have the ladies and gentlemen of the jury, we have
11 plaintiff, plaintiff's counsel, defendants, and defendants'
12 counsel. Ladies and gentlemen, I hate to interrupt your
13 proceedings, but given the hour of the day, I'm having you
14 brought in here just so I can get an idea of how much longer,
15 if at all, that you would like to work. It's 5:26, according
16 to my clock, and I'm going to ask you to go back in and send
17 out a note if you're close and you want to keep working. If
18 you're close to having a verdict or a decision and you want
19 to keep working, you need to let me know. But given the hour
20 of the day, I wouldn't want you to go too much longer. What
21 I would do is I would send you home and have you come back
22 tomorrow morning at 9:00 and resume your deliberations.

23 And again, I don't mean to interfere, you've
24 been very patient with us all week, and waiting for us, but
25 like I said, I'm not going to keep you here all hours of the

1 night working on this, again, unless you tell me that you're
2 close and you want to keep working. So why don't you go back
3 in, decide that issue, send me a note, and whatever you tell
4 me you want to do, that's what we'll do, but keep in mind I'm
5 not going to let you go much longer. I just don't think -- I
6 think it's better if people start refreshed if you're going
7 to be a long time. Okay. Go ahead.

8 (Jury Excused, 5:27 p.m.)

9 THE COURT: While the jury's out, Ms. Connor,
10 any requests or objections with regard to that charge to the
11 jury?

12 MS. CONNOR: What you just said to the jury,
13 your Honor?

14 THE COURT: Correct.

15 MS. CONNOR: No, your Honor.

16 MS. SHEEHAN: No, your Honor.

17 MR. ANDREWS: None, your Honor.

18 THE COURT: Okay. Thank you. Just wait and
19 see what they say.

20 (Pause in Proceedings.)

21 THE COURT: Okay. I've received a note from
22 the jury, it will be marked Court Exhibit Number 2, it says,
23 "Your Honor, it is all in agreement the jury will stop for
24 today and resume tomorrow morning." So I'm going to bring
25 them in and give them their instruction that I've indicated

1 previously and we'll let them go home. We'll start again
2 tomorrow at 9:00, okay. Bring them in, Bruce.

3 (Jury Present, 5:33 p.m.)

4 THE COURT: Okay. The record should reflect
5 we have the jury back in the courtroom, excuse me, plaintiff,
6 plaintiff's counsel, defendants, and defense counsel. I've
7 received your note, ladies and gentlemen, it says, "It is all
8 in agreement the jury will stop for today and resume tomorrow
9 morning." And that's fine.

10 I'll say this to you, all right. All my usual
11 precautions that I've been giving you for eight days now
12 apply, but it's even more important at this point that you
13 don't let anybody talk to you about it, don't discuss it with
14 anybody, anybody approaches you, tries to talk about it, I
15 need to know about it immediately.

16 There shouldn't be any deliberations that
17 commence, you know, until you're all together again, all
18 right. It's very important that, you know, you're at the end
19 of this case, you're in the middle of your work, but we're at
20 the end, near the end of this case. Very important now that
21 nobody comment to you, that you know, if somebody asks you
22 what's going on, I thought you were going to be done today,
23 or any of that kind of stuff, you just say, we're
24 deliberating, end of story, and don't discuss it with
25 anybody. There's a tendency now I think sometimes for jurors

1 to think, well, we're almost done, so you know, it's okay.
2 Uh-uh. Okay. No conversation, no discussion, not until
3 you're all in that jury room together, all seven of you, and
4 you're not to start any discussions unless all seven of you
5 are there to deliberate. Okay. So if some people are, and I
6 don't know who the early birds are, used to getting there
7 early or whatever, ahead of everybody, two or three of you,
8 you can't talk about it until everybody's there, all seven of
9 you have to be in the room, okay.

10 And other than that, I think you made a wise
11 decision, it's good to sometimes take a break, start fresh in
12 the morning, and tackle your work. Okay. So we're going to
13 let you go home with that caution, we'll see you at 9:00,
14 I'll take the bench and we'll just confirm that you're all in
15 the jury room and at that time, once I know all seven of you
16 are there, I'll tell the guards to let you know to start
17 deliberating, but I'll be here before 9 and as soon as you're
18 all here, we'll let you get started, even if it's a little
19 before 9. If you're all here we'll let you get started but
20 9:00 is what I'm looking for, okay. Any questions?

21 A JUROR: Yes, what do we do with the stuff we
22 have in there right now, the papers that you gave us?

23 THE COURT: It will be locked up.

24 A JUROR: Okay.

25 THE COURT: It will be locked up.

1 A JUROR: Very good.

2 THE COURT: All stay right where you've left
3 it.

4 A JUROR: Very good.

5 THE COURT: Be there for you tomorrow morning.
6 Okay. Anything else I can answer? All right. Well, then
7 you have a great night, and we'll see you tomorrow morning.

8 (Jury Excused, 5:37 p.m.)

9 THE COURT: Okay. Counsel, that will end it
10 for today. Are there any requests of anything before you
11 leave, Mr. Andrews?

12 MR. ANDREWS: I just want to know in the
13 morning is it okay, my office is about five or ten minutes
14 away, do I need to be here at 9?

15 THE COURT: No. I think that's a good point,
16 I was just thinking about that myself. If you're available
17 and we can get you here quickly, that's fine with me, you
18 don't have to be here at 9:00. Certainly, you know, even if
19 they get started right at 9:00, I would be surprised if we
20 had any notes before 9:15, 9:30, till they get going again
21 even if it's a note to request something. So if you're ten
22 minutes away, we can reach you, that's fine with me.
23 Otherwise, you know, as long as you're here, rest of you, if
24 you're not going to be ten minutes away and available, if you
25 want 9:15, 9:30, in that area will be fine, okay?

1 MR. ANDREWS: Thank you.

2 THE COURT: Little bonus sleep-in time, after
3 a long week. Okay. We'll see you tomorrow. Have a good
4 night.

5 (Court Adjourned, 5:38 p.m.)
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C E R T I F I C A T I O N

I, JODI L. HIBBARD, RPR, CRR, CSR,
Official Court Reporter in and for the United States
District Court, Northern District of New York, DO
HEREBY CERTIFY that I attended the foregoing
proceedings, took stenographic notes of the same,
and that the foregoing is a true and correct
transcript thereof.

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter